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# AN INVESTOR'S NOTES

ON

# AMERICAN RAILROADS

BY

JOHN SWANN, M.A., OXON.

COUNSELLOR-AT-LAW AND SOMETIME GENERAL MANAGER ALABAMA GREAT  
SOUTHERN RAILROAD

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*SECOND EDITION, REVISED AND ENLARGED*

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## PREFACE.

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A GOOD deal has of late years been written by experts touching the history, growth and management of railways, their duties to the State, and their relation to the people. Many valuable conclusions have been arrived at, and much technical knowledge has been made accessible to the casual reader. In the excellent and well-known work of Mr. Charles Francis Adams Jr. published in 1880,\* and the late able works of Prof. Hadley † and Mr. J. F. Hudson ‡ published in 1886, historical, administrative and political aspects of the subject have been handled with accurate knowledge and in attractive form. But, if we except the necessarily cumbrous works, which deal with large masses of figures and require attentive study for their profitable interpretation, the interest of the investor, as such, and notably that of the European investor in American railroad securities, seems to have been overlooked or lightly regarded.

Possibly, if the European outlook had not been somewhat stormy, and large changes in the conditions affecting property in the British Empire had not been distinctly foreshadowed, the interest of the investor, as such, might have rightly been considered a matter of small immediate moment, and undeserving special consideration. But it

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\* "Railroads, their Origin and Problems." C. F. Adams Jr.

† "Railroad Transportation." Prof. A. T. Hadley.

‡ "The Railways and the Republic." Jas. F. Hudson.

is conceived by the present writer that very large changes in European investment are likely to occur in the course of the next few years, and that a liberal transfer of capital will be made from European to American securities. Experience conclusively shows that, in the past, the casual investor has given but slight personal attention to the choice or protection of his investments in American railroads. It is accordingly thought possible that a few practical observations on salient points in the situation may be acceptable to those investors who have neither time nor inclination for any approach to exhaustive investigation of the subject.

The present notes are confined to a very limited aspect of the railroad problem—viz., that small range of conditions which affects the interest of the investor, as such. Even in a most superficial view of the subject, the conclusions of experts must inevitably be utilized as data for specific inferences relating to the interest of an investor. In this view, many conclusions contained in the valuable works above indicated have been used or referred to, and the writer's obligations to their authors are freely acknowledged.

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# AN INVESTOR'S NOTES ON AMERICAN RAILROADS.

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## CHAPTER I.

### SPHERES OF INVESTMENT.

SOME fifteen years ago it was held by the writer's friends and by a large section of English society that the government and institutions of America were separated from those of England by an impassable gulf. Every thing American was thought to be more or less ephemeral and transitory, because unprotected by ancient traditions, tending to the growth of an enlightened conservatism. Rights of property in that country were thought by many Englishmen to be more or less illusory, and the permanence of social institutions uncertain and untrustworthy.

Concerning English institutions, on the other hand, a different impression prevailed. It was thought that around property in Great Britain, and especially around the time-honoured freehold, there stood the British Constitution, firm as the hills which stood around Jerusalem. A man who seriously compared the stability of property in England with that of property in America would have been considered scarcely fit to be at large. But since that time many things have happened. Entries have been made on England's record which somewhat alter the relative situation. Such words as "Midlothian,"

"Kilmainham," "National League," "Fundamental Law," "Home Rule," "Three acres and a cow," "Ransom," "House League," suggest political inferences which fifteen years ago were never dreamed of. London has rioted, and Queen Victoria has abdicated in favour of Mr. Parnell. It has been made clear that the equal enforcement of established law and the protection of existing rights are no longer regarded as absolutely essential to British freedom and prosperity; but are subject to modification or suspension, for the mere purposes of party warfare or personal popularity.

Now the rights of property have been ascertained and defined by a long line of thoughtful precedents and well-reasoned decisions. The immense value of certainty in respect of the rights of property, as a factor in credit and commerce, can scarcely be over-rated. Upon this certainty, as upon a sure foundation, was gradually built up the superstructure of England's commercial supremacy. It is true that the present age is apt to be resentful of authority. But the fathers of English jurisprudence, though certainly not all Solomons, were not invariably simpletons. In the aggregate of their decisions may be found a comprehensive chart, which thoughtfully and critically defines the rights of a free people in the property which they own and the remedies incident thereto. To the casual observer it seems somewhat rash to make these solemn and enlightened sanctions subject to the impulses of the restless or lawless members of the community. In a case where such broad and vital interests are concerned, is it worth while to tear up the chart which marks with precision dangerous reefs and safe channels, and to trust to the mere passion of the hour for a safe voyage? This chart which law has laid down is cold-blooded and criti-



cal, if you like; but for that very reason it is well-considered, steadfast, trustworthy, while the impulses of popular emotion are capricious and short-sighted. To govern by reference to the passions, instead of the understanding, is something like steering an ocean steamship by the thermometer instead of the compass.

The American side of the question is also better understood. Sir Henry S. Maine has written;—and many candid readers of his able essays will hesitate before they decide that the English Constitution is impregnable, and that the American Constitution is all moonshine. As things now stand, some considerations occur which would seem to render appropriate to the present time a budget of suggestive notes on the subject of investment, provided they should make no attempt at exhaustive treatment of any thing, nor trespass unduly on the time and patience of a busy or pre-occupied investor.

However great and noble may be the advantages which are likely to accrue to the British Empire from the onward march of democracy, it must be admitted that the financial outlook, if not in the last degree depressing, is at least stormy and suggestive of grave uncertainties. Of course critical periods occur during which political talk, involving [*e. g.*] the integrity of an empire, the rights of property, or the tenure of office by particular men, is exclusively in order. But, as there is a time for every thing which affects the problem of human welfare, occasions recur when finance of the humbler type and the economical investment of individual fortunes may deserve passing consideration. The material prosperity of those classes in the community, which by reason of thrift or inheritance possess accumulated wealth, must sooner or later claim a

hearing. Even the Irish land question is thought by some observers to be tinged with the hue of gold, as well as of blood. Whatever solution of this urgent question may be desired by Mr. Gladstone, it is probable that property invested in Ireland under government pledges will be to some extent protected. It is a matter of deep regret that money when once released from Ireland will not generally seek reinvestment there. But, as a financial fact, it is improbable that it will do so, except under very special conditions and subject to somewhat narrow limits. From the investor's point of view, security of principal and peaceful collection of interest are at least as important as the prospect of liberal profits. As a matter of business, wholly apart from political or party considerations, prudent investors reasonably shrink from locking up their money in any country in which the law is not supreme, or in which the mechanism necessary for the enforcement of existing rights is substantially impaired or indefinitely suspended. A reasonably sound railroad bond may furnish, at most, four or five per cent. on invested capital. But, if at the end of each half-year the holder can collect his coupons peacefully and punctually, this result is on the whole fairly satisfactory. It is, at all events, a better investment than the purchase of land which the owner or mortgagee is afraid to occupy or visit, or the conduct of a business to which the system of boycotting may be any day applied. The economical prospects of Ireland practically divorced from England may be satisfactory to Mr. Gladstone, and yet far from reassuring to the casual investor in Irish securities. The point of view of the former is political, and turns on a large and popular confidence in "flesh and blood." The point of view of the latter is economical, and

turns on a paltry and unpopular estimate of pounds shillings and pence. A political blunder might be lightly survived by Mr. Gladstone, but an economical mistake might be a serious calamity to an investor of moderate means. If the Nationalist party are disinclined to protect rights in land, and are not particularly cordial towards their best local industries, such as the linen manufacture, an intending investor naturally distrusts the law-abiding instincts of the new régime. Not even Mr. Gladstone's eloquence can persuade him that capricious legislation can make rich and strong a people endowed with a poor soil, if such legislation encourages thriftless habits or lawless instincts. The sources of national wealth lie deeper. The severance of the last link which binds Ireland to England is a good phrase, and has a fine free ring about it. No doubt it tickles the ear of the Nationalist, who has not been overthrift in the past and would like to shirk work in the future. But the colder-blooded business man will note that, when this last link is severed, capital and credit will go down in the general crash. He will be apt to reflect that, while absolute independence is intrinsically a noble thing, its permanent beauty is largely dependent on environment. Of course freedom attended by prosperity commands the admiration of the civilized world. But freedom associated with famine makes at best a gloomy picture. A particular form of government is like the bubble on the champagne. It is the vintage that determines the bubble, and not the bubble the vintage. The governing body will represent, with some rough approximation to accuracy, the character and qualities of the constituencies which confer power. If constituencies exhibit characteristics which fail to inspire faith in their just, temperate, and law-abiding instincts,

the confidence of the investor will be proportionately discounted. "If," he will ask, "they do these things in a green tree, what shall be done in the dry?" He will regulate his investments accordingly.

Then, again, as regards the European outlook, it may well be that a firm foreign policy will eventually secure peace. But, if the past be any guide to the future, it is impossible to dismiss all apprehension under this head. It is enough for the present purpose to indicate that a European war is, in the last degree, unfavourable to confident and liberal investment in European securities, outside the British Empire.

As regards English land and the industries directly appurtenant thereto, it would of course be absurd to dogmatize. But it is still worth noting that—next to serious calamities involving wholesale destruction of material assets—nothing tends so directly to depress property, and to chill legitimate investment in its development, as uncertainty affecting existing rights. England's well-wishers cordially hope that English land may recover its prestige and profit. But would any prudent lawyer, in the face of State socialism and foreign competition, recommend his clients as landowners to expend their means lavishly on the development of their freeholds? Would he not rather advise them to invest their capital in more remunerative and more readily convertible securities, and to become tenants of whatever land they require? If there be any truth in this view, it is probable that, in the course of the next few years, we shall see large accumulations of unemployed money seeking such investment as may combine reasonable security with fairly remunerative interest. The question arises, where is a suitable sphere of investment to be found?



The feasibility of judicious investment in America has of late been the subject of warm discussion in European circles; and grave issues have been raised by the partisans of incompatible theories. There are many who think that, whenever Europe invests capital in America, it will of necessity follow that America will make the profit, and that Europe will have to be content with the experience. There are others who think that the existing Constitution of America affords a substantial security for vested interests. They hold that written provisions, which [amongst other things] forbid the impairment of a contract and are subject to interpretation by the Supreme Court of the United States, are more trustworthy safeguards to vested interests, than the personal discretion of any advanced reformer. They would rather risk their money on provisions, which cannot be repealed except by a very deliberate verdict of a whole nation, than on impulses referable to the personal career of any individual statesman, who may have acquired the power of over-riding—but does not, in the last resort, adequately represent—the convictions of educated people. They consider that, as it is in times of internal peace that prosperity goes forward “by leaps and bounds,” invested money has, on the whole, a better prospect in America than elsewhere. It is not the purpose of these notes to determine the comparative merits of such conflicting views. Their purpose is simply to submit some conclusions gathered from many years of residence in the Country, and many years of intimate acquaintance with the inside history and conditions of current, and especially railroad, investment. By persons well informed on this subject such notes may rightly be regarded as ancient history expressed in an unattractive form. But all are not experts in foreign

business. There remain the uninitiated, who—by lack of time or the pressure of other engagements—have been constrained to invest in American securities, without forming any critical judgment of their own on any specific sphere of investment. To such the present notes may perhaps furnish suggestions tending to guide the judgment in the protection of existing, and the choice of future, investments. Roughly stated, the vital questions for a European investor in American securities are something like the following: Are the losses and disasters of the past properly referable to conditions inherent in American securities, *as such*, or have they resulted in great part from exceptional misfortune, or the contributory negligence of the investor; and, if so, to what extent? Was it or was it not, in the past, competent to investors to discern the signs of the times, with a nearer approach to correctness than they ever in fact achieved? Is it competent to them in the future, by the observance of a few simple indications, to avoid the graver class of mistake? Obviously, life is not long enough for an exhaustive examination of every proposed investment. But, if serious error is to be avoided, are there any landmarks intelligible to the casual observer which may suffice—if not to indicate reasonably safe routes—to warn the traveller against dangerous pitfalls? To the mind of the seafarer the lighthouse is not as exhaustive as an ocean chart. But nevertheless it fulfils a useful purpose. It appeals to the eye of the unwary, and marks the existence of a dangerous reef, though it makes no pretensions to map out safe channels. It seems to the writer that the chance of doing something in this direction might justify a modest effort. In this view of the subject, the scope of the present notes is strictly limited, and their object is

the reverse of ambitious. An endeavour has been made to subserve the convenience of the reader by the addition of a comprehensive index.

The total capital invested in American railroads represents an enormous sum. Its precise dimensions cannot be determined with absolute exactness, because there exists a wide difference, in the first place, between the amount nominally and the amount actually expended in construction; and, in the second, between the nominal value of securities and the price actually paid for them by their holders. But, allowing a wide margin for elements of uncertainty, it may be taken as fairly established that the total investment approximates to thirteen hundred millions sterling, and that of this the larger part is foreign.

1,300,000,000

In days when it is the custom for financiers to think in millions, it can scarcely be matter for surprise to find investments of enormous amount treated in a somewhat airy fashion. But, if the true significance of seven or eight hundred millions sterling be thoroughly grasped, it will be seen that a sum of this magnitude is a feature of real importance in the commercial and social history of the day. It forms an appreciable element in any exhaustive estimate of national wealth. It represents the sinews of a vast aggregate of productive enterprise, and the "hoarded self-denial" of tens of thousands of investors. Now this<sup>1</sup> huge investment is made up of securities varying widely in character and quality. Some of them are sound and productive; but very many possess a modest present and a doubtful future value. During periods of so-called "inflation," the constructive impulse far out-ran the indications of demand. The cart was put before the horse, and railroads were built in advance of any real need of them, by

means of bonds placed in Europe. The securities issued by many of these railroads are not sufficiently sound or attractive to be absorbed by American investors. That is a point of some importance, and very pertinent to the matter in hand, because the money invested in these securities must, as between Europe and America, be considered to be finally sunk. It is scarcely necessary to point out that investments, which are permanently located on American soil but which America will not re-purchase from Europe, are beyond all others the most susceptible to the influences of rash legislation. It is true that many railroad loans negotiated in Europe on the security of faith rather than of works have, by reason of the rapid settlement and the extraordinary internal resources of particular districts, grown steadily in value. But it must not be forgotten that conditions of a specially favourable character attended this growth. The increment of value—which the constructors of a railroad must be taken to have relied on as an equivalent for extraordinary risks—was allowed to enure in its integrity to the benefit of the constructing companies. No legislation was proposed tending to reduce the earning power of a railroad, or to limit its possible dividends. On the contrary, the elements of growth and of recuperative power were fostered by an almost absolute freedom from government interference.

It is assumed then by the present writer that European investors have a large stake in America to protect ; and that, owing to political and social complications in the European outlook, a good deal of capital, which is timid and sensitive to the action of violent influences, will probably seek investment in this Country in the course of the next ten years. If there be truth in this view, there would seem to be some show of reason in selecting the



present time for a brief reconsideration of some salient points in the railroad situation. To invest such brief reconsideration with a modest value, it is by no means necessary that the points to which attention is directed should be new or original. It is exactly because well-worn maxims have become too familiar that they are so often forgotten or overlooked. Familiarity has bred contempt, and thus useful indications are very often dismissed as hopelessly stale. But a truism does not cease to be true because it is trite.

In making any forecast about the future, it is wise—if not indispensable—to remember ancient landmarks, and from time to time to make a comparative survey of the ground, taking note of changed conditions and new elements in the situation. The environment of many railroads is materially changed since the European investor first put his money into them. There are available to-day data relating to the settlement and resources of many districts, which some years ago were obscure or unascertained. To-day there has grown up a rank crop of legislation affecting railroad property, which formerly was never dreamed of. State and Federal courts have made decisions on various branches of the subject which were not anticipated. Popular sentiment has undergone great change; and the drift of feeling, in comparatively prosperous days, is less cordial to the investor than in days of extreme adversity, when ready money was scarce and its possession was regarded as a considerable merit in the possessor. There is, in short, abundant room for vigilance and a large sphere for judgment and discretion. If that be so, the lessons of the past may perhaps to some extent, be utilized for the guidance of the future; and it does not follow that nothing is valuable which is not fresh.

The investor wants rather what is true than what is new. A substantially correct statement of data, which are to-day available for his purposes, is likely to be more useful to him than original theories or ingenious prophecy. Accordingly, for the sake of convenience, it is proposed to jot down, under separate headings, a few notes on several points in the railroad situation, which appear to have been forgotten or overlooked, and which, under the rapidly changing conditions of the present age, may possibly give an uninitiated enquirer some useful hints.

Let us suppose that we have to deal with an intending investor of moderate means, who has very slight acquaintance with the conditions of the American market. Knowledge of details and inferences derivable therefrom, which are ancient history to the expert, may be to him obscure or unknown. It is proposed to make some notes on the following subjects in their order:

1. Spheres of Investment.
2. Fair and Free Trade.
3. Control.
4. Combination.
5. Pools.
6. Water.
7. Parallel Lines.
8. Reorganization.
9. Proxies.
10. Funding.
11. Receivers' Certificates.
12. Corners.
13. Publicity.
14. Railroad Commissions.
15. Vested Interests.
16. State Control,

17. Geographical Direction of Railroads.
18. Some Important Decisions.
19. Short Appendix. Report of Railroad Commissions, etc.

In any intelligent endeavour to appraise at its true value the merits of any particular sphere of investment, the institutions of any given country are at least as important as its intrinsic resources. If the habits of the people, its social machinery, legislative procedure and jurisprudence be unsettled or unsatisfactory, the value of its internal resources is, from the investor's point of view, indefinitely depreciated and discounted. If there is much that is defective in American institutions, there is also much that is re-assuring. Of course, divergences of opinion on so large a subject must, of necessity, be broad and frequent. But there are data easily accessible to everybody which may be profitably used in the formation of an approximately correct judgment. The following observations are addressed to this view of the subject.

## CHAPTER II.

### FAIR AND FREE TRADE.

A GOOD deal has of late years been said by the unpromising champions of free trade about the gross absurdity of the rejection of their doctrines by the American people. No doubt, on both sides of this question, many good arguments might be urged, which it is not the purpose of the present notes to set forth. It may however be said shortly that, in the writer's opinion, it has been a substantial advantage to England that America has not entered into commercial competition with her on the basis of free trade. As a matter of course, every nation which competes in the great commercial race is handicapped by a variety of conditions, which the political economist can formulate with some approach to correctness. Notable among these conditions are internal resources, area, soil and climate, the energy of the people, their law-abiding instincts, and their willingness to give to superior skill and energy the compensation to which it is entitled. Whatever superiority England may have possessed in past times, in respect of the character and habits of its working population, it can scarcely be stated—with any semblance of confidence—that this superiority will be permanent. In past times the classes in England who excelled in skill and endurance produced a larger and more valuable output in their respective spheres of industry than any other people in the world.



It was precisely because they did so that they were able to undersell foreign competitors in foreign markets, and especially in newly discovered spheres of enterprise. The policy of free trade, as enunciated by Messrs. Cobden and Bright, was at all events robust in fibre and liberal in aspiration. On their theory, it was to be competent to the consumer to buy whatever he required in the cheapest market. Raw materials for specific industries were to come to him untaxed, and the necessities of life, which he consumed while converting raw materials into finished products, were to be relatively cheap. But the modern Liberal—or shall we say Socialist?—school disregards the doctrines of free trade which favour free contract and promote self-help. Contribution in the form of school fees was an important element in the arguments offered in support of compulsory education. Offer the people free education, and you at once diminish the value, in their eyes, of the commodity supplied, and invite them to be wholly dependent, instead of partially self-supporting. Offer the poorer classes of the people a subsidy from the State as a means of livelihood, instead of stimulating the thrift and responsibility underlying the duties of good citizenship, and you sap the morals and weaken the backbone of that very labouring class which it is the delight of the demagogue to flatter and mislead. If the lessons derivable from many years' experience in the imperfect administration of a defective poor-law have failed to convince the Socialist school that its champions are preparing the downfall of England's commercial supremacy, "neither will they be persuaded though one rose from the dead." Limit by statutory enactment the hours of labour, and you reduce, at one stroke, the productive capacity of a community which is probably,

taken as a whole, the most efficient producer in the world. And what do you get in return for this gratuitous legislative interference? Certainly not an increase in the national wealth. For the German and Belgian artisan will work longer hours for less wages; and, if so, the capitalist who employs him can, with a fair profit, take up contracts which the English employer of labour could not safely touch. You certainly do not benefit the skilled artisan of the highest class. It is his ambition to utilize his superior physique, his great power of endurance, and the valuable skill which enables him to produce more rapidly as well as more effectually than the average workman, for the advancement in life of himself and his family. To limit the hours of labour is to level him down against his will.

It is indeed said that, by authoritatively restricting the hours devoted to production, you will improve the happiness of the people and their physical and material welfare. Nobody doubts that, in a certain limited sense, less work and more play is reasonably desired by every working bee in the great national hive. The Saturday half-holiday, and such additional periods of rest and refreshment as may be voluntarily agreed upon between the employer and employed, are doubtless tonic and wholesome arrangements. But is it quite clear that legislative restriction of the hours of labour will, in the long run, tend to a beneficial result, without involving a serious set-off in point of disadvantage?

Suppose the limitation of production by statutory enactment causes the withdrawal of capital from current enterprise, and the transfer of valuable contracts from English to foreign artisans. You will have compelled an industrious community to work below its maximum

productive power; and you will practically transfer, by legislative enactment, a large portion of the work, which it would gladly have performed, to other producing communities in which supply and demand are permitted to take care of themselves. You will have taught a self-reliant community to look for its prosperity to the State, instead of to its own unassisted energy and skill. Against the improved happiness, which your State socialism confers on its nurselings, you must set off the diminution of vigour which arises from dependence. If the survival of the fittest—subject to certain reasonable and humane limitations—be the law of societies and nations, the least governed is, in the long run, the most likely to survive. Whom then do you benefit by your restrictive legislation? Only the demagogue, who hopes to attain office by the votes of the ignorant whom he has misled, and the officers of his pet organizations, who will be paid liberal salaries for drilling ignorant voters into the acceptance of untenable doctrines. Neither history nor analogy affords sufficient ground for believing that the temporary protection of specific industries tends to demoralize or pauperize a people in the same sense or to the same extent as State socialism. It is not denied by the advocates of protection in this country that the right of the consumer to buy what he needs in the cheapest market is sustained by the general tenour of free institutions. But they argue that other considerations must be taken into account. These may be briefly summarized as follows:

1. The statesman who desires the welfare of the country for which he legislates must have regard to the America, not exclusively of to-day or to-morrow, but to the America of twenty-five, fifty, one hundred years hence. The international competition for the commercial supremacy of the

world is not a short race, but a very long one. In such a race the competitors are all handicapped; and weight will tell every yard of the way from the start to the finish.

2. If that be so, it is prudent to consider what weight America has to carry in the race, as compared with other competitors. The answer popularly given to this question is that she has several points in her favour—economical, political, and social.

(a.) *Economical*.—She possesses immense territorial area and great varieties of climate, which may hereafter enable her to compete with foreign countries in many—not to say most—of the staple articles of commerce. For example: If her cotton product were worked up on or near the ground where it is raised, great economies in transportation and handling of raw materials might be effected. If her iron industry (rolling, nail, hardware mills etc.) were prosecuted on the ground where the coal and the iron lie close together, a similar great saving would result. If her potteries were established in the neighbourhood of her great mines of kaolin and china-clay, like economical benefits would be derived therefrom. With advantages of this kind at the outset, the gradual influx of capital, the gradual importation of highly educated or skilled artisans, and the gradual training of her own people in special industrial schools will give her a fair chance of competing with the world within a reasonable period of some (say) twenty-five years, and possibly a good deal earlier.

(b) *Political*.—America has no foreign policy. Its absence is a great saving to the National Exchequer. She is free from the necessity of maintaining great armaments, which make heavy calls on the vigorous manhood of a nation, as well as on its pecuniary resources. For the successful development of industrial enterprise, freedom



from foreign complication is an eminently favourable condition. There is nothing to distract her attention from the development of her internal resources. From the investor's point of view, in quietness and confidence is strength. Sir Henry S. Maine has indicated, in his recent admirable essays,\* the vast difficulties which attend government by the multitude. So strongly is a kindred opinion held by a large section of the keenest observers in America, that some States have exchanged annual for biennial sessions of their Legislatures. The result has been eminently satisfactory. As long as a Legislature is in session, it is impossible to foresee what tinkering with property will be devised. Investors are hushed and afraid, and active business is chilled. If drastic legislation against property is proposed, capital will inevitably flee away. In these States the general desire is that things of no particular moment may exhaust the session. When an adjournment for two years is announced, everybody rejoices and settles down to business. This feeling involves no disrespect on the part of the people for their chosen representatives. They may be the best of men. But thirst for "making a record" and proposing violent measures is felt to be fatal to prosperity. The maiden speech of a thoroughly Radical orator may be the knell of a new railroad, coal mine, cotton mill, iron furnace, municipal loan, or the like. The country wants repose and time to develop its latent wealth. The restless demagogue is its very worst enemy. The substitution of biennial for annual sessions is more significant than pages of didactic exposition. It is a great example of the political sagacity of the American people; and it is immensely reassuring to the investor.

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\* "Popular Government," Sir Henry S. Maine.

(c) *Social*.—Although no country can, in this century, count on escaping the pest of Communism, America's power of resistance is to-day at least as high as that of any other country. A very substantial proportion of her citizens owns a little property in one form or another; and even a very limited amount of property suffices to bring the owner into line with his law-abiding fellow-citizens, as against the Socialist or the transgressor of law. Experience shows that the man who has the grit to make money has generally the grit to protect it. In a riot or a fight the owner of a little homestead or store is worth ten loafers. He has more nerve, a stiffer backbone, and something to lose, which the loafer has not. His six-shooter is of a better quality than that of the loafer, his powder is straighter, and, in short, there is a better man behind the gun. That as time goes on organized labour will, as between labour and capital, obtain a larger share of the profits of industry than it has heretofore received may be accepted as a foregone conclusion. Such a result will probably not be confined to America; but will extend, at no very remote period, to the whole of the civilized world. The question for the investor is—how far inevitable reduction of interest is likely to be associated with insecurity of capital. Many indications point to the conclusion that Communism—always dangerous—is, on the whole, less alarming in America than elsewhere. The singular quietness, with which the whole nation settles down to business after the violent excitement of a contested Presidential election, affords presumptions in favour of a peaceful solution of strikes. The tendency of the people is rather to accept arbitration than to pursue labour quarrels to their ultimate logical result. Appeals *ad misericordiam*, in cases where the transgressor of law has unduly presumed

on his power to dictate terms, and—in the vernacular language—"got badly left," excite very little pity in the public mind. An uprising, which had no foundation in a real grievance and is defeated by unflinching resistance, meets with its fair share of ridicule. The public regards an unsuccessful striker very much as it regards a player who "bluffs" at poker and is promptly "called." He has met with an opponent with nerve at least as good as his own, and it is plain that, if he was "bluffing," his game is up.

It is thought by many competent observers in this country that, at no very remote interval, the immense evil arising from monetary contraction will be, to some extent, grappled with and perhaps economized. It is beginning to be realized that as the legitimate expectation of gain lies at the root of the liberal employment of capital in industrial enterprise, consistently falling prices carry with them their own special nemesis. It may be doubted whether the confidence with which a higher range of prices inspires the owners of accumulated wealth is not, on the whole, better for the producing communities of the world than a very low range of prices, which marks undue appreciation of gold, and gives to the creditor of several years' standing an undue advantage, and to the owner of unemployed wealth a silent and unperceived increment of power as against property generally.\* It is also thought not impossible that the natural shrewdness of the American wage-earner may induce him to see the propriety of submitting to a reduction of wages, if satisfied by fair explanation on the part of the capitalist that no profit can be made at subsisting rates of compensation, provided he is equally satisfied that an increase of wages will certainly follow on the realization of fair profits.

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\* The Economic Crisis and Its Causes, M. E. de Laveleye, *Contemporary Review*, May, 1886.

Again, the drift of public opinion is beginning to set in the direction of resistance to "rings," or any type of organization which lives by a policy of cajolery or intimidation and enforces on its members a sliding scale of rewards and punishments. Neither a National League nor a Birmingham "Caucus" could to-day reach its full stature in America. It would be killed by ridicule in its embryonic stage. America tried the experiment in Mr. Tweed's day, and discovered to her cost that a compact organization of irresponsible persons was a luxury altogether too expensive for a democratic community to support. She bequeathes the system as a legacy to England, with her best wishes, as a garment for which she has no further use.

Another very hopeful symptom is the discredit which is beginning to attach to solid votes. Wherever fifty or one hundred members in a representative body are prepared to vote "solid," it is plain that party organization is predominant and personal conviction subordinate. The moral value of a solid vote by the Birmingham "Caucus" or by Mr. Parnell's followers is greatly discounted by the circumstance that personal conviction and criticism are virtually excluded by the operation of an organized scale of rewards and punishments. The solid vote obviously means that party governs, and that patriotism and individual opinion are asleep. In America solid voting is on the decline, as the dignity of asserting independent conviction is becoming more generally appreciated, and the servility attached to "wearing the collar of the machine" is more generally felt.

3. Holding these views as to her place in the international handicap, it can be no matter of surprise that her citizens are willing to put up with some inconvenience for the purpose of making the Country as nearly self-sufficing



as possible. She needs no importation of food. The Mississippi valley and Texas alone, to say nothing of the undeveloped territories, afford her adequate assurance under this head. In the view of the people, it remains to utilize the resources of her area, soil and climate, and the ingenuity and energy of her citizens.

From the Protectionist point of view,—a view which contemplates an indefinitely long period,—it is held to be worth while to protect and nurse a variety of nascent industries in all those cases in which the conclusions of political economy and the relations of environment afford a reasonable presumption of eventual success. It is held (whether rightly or wrongly, experience must decide) that within a few years many of these nascent industries will be able to take care of themselves in the competition of nations, provided their infancy is nursed and fostered till they are able to walk or run without assistance. The most ardent Protectionist would scarcely contend that a protective tariff should not admit, from time to time, of wise and adroit readjustment, with a view of relieving raw material of its burdens and modifying, according to circumstances, the duties upon finished products. Common-sense and practical statesmanship may, it is thought, be trusted to deal with each case according to its peculiar merits.

When the Free-trader objects that during this period the consumer suffers, the answer commonly given is that production precedes consumption; that the producer is in turn a consumer; and that, although any specific class of producers forms, at any given time, a minority of the whole community, still the verdict of the whole people is in favour of making the Country self-sufficing. They are willing to make this effort, even at the cost of some incon-

venience to the large majority of consumers. Such a verdict is rendered by a national majority in a population of some fifty millions. It is, therefore, simply an exercise of the popular will in the direction of submitting to temporary inconvenience, for the sake of what is (rightly or wrongly) regarded as a substantial element of future national greatness. However absurd such a view may appear to the uncompromising Free-trader, it can scarcely be pooh-poohed by a candid thinker as futile or unpatriotic.

Great weight is attached in this country to the distinction between the majority of a whole community and the majority of a section or fragment of that community. The majority of the South desired secession. But the majority of the whole of the United States desired unity. Why should the majority of a section prevail over the majority of the whole people, if democratic maxims are to be consistently observed? The uncompromising advocates of Free-trade in England make but slow progress in the conversion of America. These gentlemen, say the advocates of Protection here, have laid down some excellent principles, sound in tendency and full of practical insight. If all the nations of the world would accept their rules, there is no doubt whatever that England would for many years to come profit by such a result. But suppose one successful player proposes the adoption of a rule, and several other players decline to accept it. What then? The value of a rule is indefinitely discounted by the refusal of many players to accept it. Its effect is necessarily subject to the context of circumstances. It cannot be said to be either good or bad when taken away from its correlation with its surroundings; and one of the most important of its surroundings is the consent of many players to its adoption. If England likes to walk alone, she is of course

at liberty to do so. But it would be fanciful use of English to call it walking in procession. It is further urged—possibly with some show of reason—that the English Free-trade school made a definite election between two familiar theories of national progress. It was competent to Parliament to say that they desired to make England self-sufficing all round; and, in this view, to protect and foster her agricultural and possibly other specific industries, according to the exigency of circumstances. It was also competent to Parliament to say that England's welfare would be best subserved by exclusive devotion to manufacture, trade and commerce; and that they were content that England should derive her food from foreign sources, because her people could be better employed in productive industries outside of agriculture. Perhaps, say American Protectionists, England judged wisely, in view of the special conditions affecting her case. But the conditions of America's case are widely different; and we do not care to pin our faith to a particular law or policy, if its application to a specific instance appears inappropriate and possibly disastrous. And so it has come to pass that the English view of free trade is not received in America with extraordinary cordiality.

It is unnecessary to say that the above crude remarks are not intended to make out a case for protection in America; but merely to indicate, in outline, the drift and tendency of popular feeling in this country on the subject. What bearing the existence and probable permanence of this feeling may have on the investments of foreign capitalists must, of course, be judged of by the parties concerned, according to their several idiosyncrasies and the conclusions of their particular schools of political economy. But the answers which they may think proper to give are

not wholly without meaning, if fairly applied to a comparative survey of various countries considered in one very limited aspect—viz., their relative merits as spheres of future investment. Our enquirer will not overlook the advantages of protection, whenever he proposes to invest in any particular form of protected industrial enterprise.

There is of course to-day no sufficient ground for predicting that England will not maintain, for many years to come, the commercial supremacy which she has laboured hard to achieve. But there is abundant reason to say that the course, on which she is invited by the prophets of State socialism to embark, distinctly involves a denial of the principles and practice which have made her rich and strong. It may safely be affirmed that no people educated to regard the State as its dry-nurse could ever have made such a record as the history of England discloses. When the State is everybody's nurse, no doubt the nursery is kept in good order, but the children are slow in learning how to take care of themselves. Paris would never have fallen, if some twenty years of Imperial dry-nursing had not weakened the backbone of the French people. State socialism and the impending shadow of indefinite change are very real elements in existing commercial depression in England. It is true that England is very rich. But capital divorced from confidence makes, at best, a poor show in the competition of the world. The owner of capital may honestly and sincerely desire to maintain the commercial supremacy of his own country. But, in nine cases out of ten, he would rather invest it on reasonably sound security elsewhere, than retain it in English investments on the basis of "ransom." An enquirer concerning the best mode of investing his modest competence may be perfectly willing to admit Mr. Glad-



stone's pre-eminent ability in the management of Imperial finance, and his unrivalled lucidity in the exposition of his views. But he may be wholly unable to find in the Premier's policy that kind of re-assurance which he looks for in the protection of his outlay in lands, houses, ground-rents, or many other familiar and attractive forms of investment. In the writer's opinion, it is impossible for England to undertake the serious political retrogression involved in State socialism, without suffering the penalties of corresponding financial retrogression.

Beyond a doubt the institutions of America, considered in their various bearings on profitable and safe investment, leave much to be desired. But, in spite of many drawbacks, there would seem to be a reasonable prospect of that kind of internal peace which favours industrial development, of reasonable stability in public feeling and opinion, and at least as high a security for the rights of property as can be found elsewhere. Before England had been overtaken by the wave of democracy, no doubt real property was better worth having in that country than anywhere else in the world. Its ownership—according to measure and extent—conferred on a proprietor peculiar advantages dear to the heart of the average Englishman. On the large land-owner it conferred indirect political power and an appreciable access of social importance. On the owner of a modest estate an atmosphere of solidity distinct from the ordinary incidents of mercantile prosperity. The merchant, it was thought, might be swamped by speculation, or the professional man by ill health; but Providence favoured the man of acres. You always knew where to find him—or, at all events, his property. His estate in ——— shire could not fly away. The powers that govern the universe would, it was felt,

“think twice before damning” the owner of a fair freehold estate. Liberal sporting rights and the sympathy of the county or local society made residence in a sporting shire a delightful privilege—even at the cost of low interest on invested capital. The enlightened estate agent, who was at once devout and artistic and who recommended a residence because it was close to a church, generally added that there were two packs of fox-hounds within reach, and that fair shooting and trout-fishing were obtainable. In short the ownership of English land involved a large measure of security, credit, peace and pleasure—which was honestly worth every penny of the price paid for it. But this view is undergoing a steady process of dissolution. Investors of capital must judge for themselves, in view of recent political and social complications, on which side of the Atlantic they have, on the whole, the best prospect of protecting and enlarging their store. One thing is plain, that if England abdicates her commercial supremacy, the humiliating process will not have been compelled from without, but invited from within. She will have decided for herself what is a proper price to pay for a somewhat servile observance of successful demagogues.

## CHAPTER III.

### CONTROL.

ON the mind of an uninitiated visitor to Wall Street a strong impression is made by the constant recurrence of the word 'Control' in discussions affecting the securities of railroad companies and their various degrees of merit or demerit. He hears experts say that it is dangerous to touch this or that stock, because it is "controlled by A. or by B's crowd,—and you never quite know where you are." Or, again, that the stock of the C. Railroad will never really be good for any thing until the road is "controlled by K. and his people." The stranger had supposed that the value of the securities of any given railroad was roughly measured by comparatively simple and definite conditions; such, for instance, as the amount of the company's fixed and floating debt, the volume of its business, the relation between net and gross receipts, the ability of its executive, and so forth. Ten or twelve years' familiarity with the details of railroad administration in its various relations to Wall Street would lead him to the conclusion that "control" has more to do with values than he had supposed, and that it is a word of the first importance in the railroad vocabulary.

Some observations have been made above (pages 8-10) as to the history and growth of American railroads, and it has been indicated that a great number of these have

been built in very large part with foreign money. It has been further noticed that many of these were built in advance of any real need for them ; and were, in short, rather promoters' roads, than expressions of genuine supply addressed to meet a pressing demand for effective transportation.

In days of so-called "inflation," which perhaps might better be described as periods of irrepressible speculative restlessness, there was a general scramble for all sorts of privileges which seemed to possess elements of remote potential value. Concessions to construct public works and enterprises in foreign countries were eagerly sought, in spite of very imperfect knowledge of their environment. A promising sphere for the construction of a railroad was instantly pounced upon, and innumerable routes for future railroads were selected and protected by charters granted by various American States. The limited scope of such charters was but imperfectly understood in Europe, or understood only by a few, and not generally investigated or discussed. The solemnity of a charter, its seal, its language, its formality, were impressive details. If a Government subsidy in the form of land were added, the success of an effort to raise money in Europe was almost assured. To the uninstructed mind, the notion of connecting the "rolling Atlantic" with the waters of the "blue Pacific" was pictorially irresistible. To "tap" the resources of districts possessing untold latent wealth seemed an attractive privilege, rather than an incalculable risk. And so it happened that European money was very freely invested. So great was the encouragement offered to the energetic American, that he did not hesitate to employ his means in building a mile or two of railroad from his house to his sand-pit in an Eastern State, and then fear-



lessly propose extension to San Francisco, or some other indefinitely remote point. It is quite true that he might be imperfectly equipped for so great an undertaking. He might, for instance, have a mule and a five-dollar bill. History shows that this is an insufficient basis on which to undertake a transcontinental railroad. Still, if Europe was good to find the necessary money, the energetic contractor had no reason to complain. When the money was provided, the foreign investor rarely took the pains to insist on having his own representative on the board of the constructing company, or on its executive committee, for the purpose of checking improper expenditure; and the neglect of this precaution resulted in a luxuriant crop of extravagance and jobbery, which judicious restraint might have prevented or minimized.

The tremendous effort made by the North to preserve the integrity of the Union was a fine display of decision and patriotism. But it necessarily involved sacrifices resulting in grave and enduring difficulties. The inevitable effect of the war was to let loose evil passions and to disintegrate, to a certain extent, the creed and the canons of commercial morality. A vast number of people had been hopelessly wrecked and ruined. It could hardly be expected that complete re-adjustment of old relations would be accomplished in a year. The Country was depressed. Ill-conceived undertakings failed to answer the expectations formed of them. Many railroads constructed or in course of construction failed to pay or to give reasonable assurance of ultimate success. Their securities could not be regarded as safe and profitable investments, and became a foot-ball upon the "Street." Fortunes could not be made out of their coupons or dividends. Yet, many large fortunes were put together in Wall Street in

connection with railroads to a large extent built by foreign capital,—and quite unsuccessful,—considered as strictly commercial concerns. Observant people were struck with this difficulty, and enquired for the key. The answer they received was simply “Control.”

To give a scientific definition of this word, in such a form as to meet the requirements of the critic, would be difficult; at all events, it is too serious a task for the writer to attempt. A rough description of one of its aspects—sufficient for immediate practical purposes—may properly be essayed. In this view, “Control” is the power of creating and regulating a market, in relation to the securities of a given undertaking, which its creator subsequently proposes to interpret for his own advantage. Obviously, this attempt at description must appear very obscure in the absence of some reference to the context of circumstances. It may be pertinent to indicate one or two salient points. The general situation postulated certain conditions, which might be matter of regret, but could scarcely be matter for wonder or surprise. As above noted, a serious shock had been given to subsisting commercial relations and to the unwritten code which was supposed to define and govern good faith in trade. The unflinching repudiation of their just obligations by several American States is evidence (sufficient for the present purpose) of the existence of great demoralization. Many enterprises when involved in serious difficulty had been resuscitated or helped more than once by Wall Street financiers, and were virtually in their hands. The latter had little hope of recovering their outlay from coupons on bonds or dividends on stock. But, if the restless spirit of the day made the securities of these doubtful enterprises sufficiently active (in its

technical sense), remunerative coups in stock might occasionally be possible.

Let us imagine ourselves for a moment going into council in Wall Street or its neighbourhood, and considering, in a comfortable bank parlour over excellent cigars, how "Control" might be utilized for the purpose of retrieving serious losses or risks on the part of the Wall Street allies of the railroad. Let us suppose, for argument's sake, that an imaginary railroad, the prospects of which are under discussion, has an unduly large capital, and that a great majority of its securities are held in Europe; that it has, so far, not finally or badly defaulted on its funded indebtedness; that there is an active market with an upward tendency; that the latest official report of the road has inspired some confidence; and that its stock is worth—for speculative purposes—(say) forty cents on the dollar. Its floating debt is in fact very large, because it has a great deal of outstanding paper, which, though approaching maturity, has not actually matured, and has therefore not been published as part of its floating debt. The state of the market is very tempting. We call upon Mr. Jefferson J. Wiggins, whose intelligence is well-known, and who has a great deal of money in the road, to advise us what we shall do. To save time and avoid unnecessary details the effect of his advice may be crudely summarized as follows:

1st. The stock is at forty, market active. Some months must elapse before crops can be moved. Plenty of room for successful operation. Roughly as follows:

2d. Let our pool sell "short" at present prices, but gradually, not hurrying the market. Before the stock goes down to twenty-seven, we shall have sold enough to initiate a coup.

3d. We want to cover our "shorts" at about twenty. Proceed as follows :

(a) Let our financial organ state that the prospects of the harvest to which we have looked forward are very poor. Express doubts whether the Directors ought not to fund next coupon.

(b) Let prominent stockholder announce that he has trustworthy information to the effect that the last dividend on preference stock was not earned. He therefore asks immediate Receivership.

(c) In view of this important development, let Directors announce that they feel it incumbent on them to pass the next coupon.

(d) Let organ state that negotiations concerning terminal facilities in a leading city have broken down.

(e) Let a prominent bondholder connected with the only leased line that pays propose to take immediate proceedings to invalidate the lease.

(f) Let organ announce that there is an immediate prospect of a war of rates. Under the circumstances, in spite of the vast business which the road carries on, it will probably have to do a great part of it during the next year at less than cost.

(g) Let a prominent reformer suggest a legislative investigation with a view to the forfeiture of the charter.

The above programme will probably put the stock down below twenty. All that you can buy at that figure will give you a profit when we are hereafter ready to put up the stock.

Imagine yourself a foreign stockholder under these depressing circumstances. You naturally tear your hair and sell out without a moment's delay. Perhaps it does not occur to you that the party who put down the price will, in fact, become the purchasers of your stock.



Let us now avail ourselves for a moment of the privilege extended to the dramatist and novelist, and say that here an interval of some months has elapsed, and then let us suppose ourselves meeting again amid personal surroundings similar to those above outlined. Our little friendly pool has sold "short" largely, beginning at forty, and have "covered their shorts" (*i. e.*, bought back cheaply stock which they sold dearly for future delivery) in the twenties. Some members of the pool who could raise the ready money have bought heavily in the neighbourhood of twenty. Since the meeting above described the market has undergone many fluctuations, but it is to-day active and buoyant. Again we defer to Mr. Jefferson J. Wiggins' great experience, and ask him what we shall do. Again we summarize the effect of his masterly advice in a few crude paragraphs:

1st. The market, says he, is favourable. Stock will go up rapidly, if we have any thing to go up on. Why not try something as follows?

(a) Let organ state, at convenient intervals of time, that, much needless alarm having been felt about the floating debt of the Company, we are authorized to say that our indefatigable President is negotiating with an eminent firm of bankers for the complete discharge of this indebtedness by the issue of (say) income bonds. This will enable the Company to handle the unexpected access of its business with unexampled promptness and efficiency.

(b) Organ: We are delighted to announce that the wretched croakers who prophesied a bad harvest are wholly mistaken in their forecast. In respect of one Road (our Road) at least, it is confidently anticipated that the volume of business will surpass the record of any previous year,

(c) Organ again: We are glad to be able to announce that the prominent stockholder, whose deep sense of integrity compelled him to institute a suit against the Company, in spite of his reluctance to prejudice his own pecuniary interests, has withdrawn his suit, and acknowledges in his well-known frank and manly way that he was entirely mistaken in supposing that a dividend on preference stock had been improperly paid. We understand that he has fortified his opinion by a large increase in his already heavy investments in the securities of the Company.

(d) Organ again: We understand that our indefatigable President has succeeded in securing, on very favourable terms, an alliance with the K. C. B. system. By this well-conceived and far-sighted policy it is plain that the immense traffic accruing from a direct connection at Jericho Junction with the Jerusalem extension of the K. C. B. system will hereafter pass over the track of the A. B. (our) Road, and indefinitely increase the volume of its already enormous traffic.

(e) Organ again: In view of this astounding development, the indefatigable President of the A. B. Railroad has entered into negotiations with a prominent syndicate of European bankers with a view to laying the whole line of the A. B. Railroad with steel rails. It is thought that, on the L. M. section of this great road, it may be necessary to quadruple the existing track, in anticipation of the immense access of business expected during the approaching Fall.

(f) Organ again: Negotiations for extended terminal facilities in the City of Q., which were recently intercepted, have been resumed under conditions favourable to the A. B. Railroad. This coup must be regarded as a most important (though scarcely to be expected) addition to

the resources of this great system, which bids fair to swallow up its rivals, as the rod of Aaron swallowed the futile devices of the Egyptian magicians.

(*g*) Organ again: We are authorized to contradict the impression that any legislative investigation is intended, as it has been conclusively demonstrated that no grounds exist for such a proceeding. A prominent Legislator has stated in a recent interview that the future of the A. B. Railroad appears to him exactly like that of the great American Republic, occasionally decried by the ignorant and irresponsible, but ultimately destined to proceed without interruption on its majestic march, wholly regardless of the petty obstacles interposed in its path by envious and disappointed rivals.

It is scarcely necessary to say that Mr. Wiggins' insight into the situation is promptly accepted, and week by week the stock recovers itself by "leaps and bounds." Once more the wretched foreign stockholder tears his hair, and instructs his brokers without a moment's delay to buy back the stock which, in an access of unreasoning panic, he recently sold. "How, in the name of all the gods," he says to himself, "can anybody be so foolish as to part with a stock of this description for the nominal value of fifty cents on the dollar? Well," he resumes thoughtfully, "I was once foolish enough to sell out my stock in obedience to a misguided impulse, and I suppose that others are the unhappy victims of the same delusion. Why should I not recoup myself at their expense?" Poor man! He does not know that the same party which bought his stock at twenty will before long quietly "unload" upon him in the neighbourhood of fifty, and that ere two years have elapsed the same process with all its harrowing details will be repeated.

But it is not merely in respect of the adroit manipulation of the market that the word "Control" has a special significance for the uninstructed investor. The word involves many other important elements of success or failure—(*e. g.*) the question of leased lines, issue of new capital, special contracts and the like.

### *Leased Lines.*

As the investor becomes more familiar with the subject, he will readily note that many trunk lines, which would pay enormous dividends if standing alone, are grievously hampered by parasitical groups of leased lines. He will conclude that, in many instances, what are popularly known as "feeders" might better be described as "suckers." The old tree has plenty of sap, but it needs the pruning knife. Instances of course occur in which an expensive branch line not only pays its way but helps the main stem. But, in a far larger number of instances, branches constitute a serious embarrassment. Sometimes it happens that the branch line has been originally built by private projectors, either with a view to develop real estate of their own, or in deference to popular clamour in local circles. If the cost of building such a branch had never been incurred, nor its adoption by a main line procured, a clique of land owners or perhaps a limited local public might have been dissatisfied. But still topographical and physical conditions would have compelled them to bring the bulk of their business to the main line. In short, what the main line really gains from the extension is, not the whole of the business carried by the extension, but only the excess over and above the amount of business which the main line would have obtained in any case if the extension had not been built. That circumstance



appreciably reduces the desirability of the branch, and puts a new interpretation on its earning power, as compared with the cost of construction and maintenance.

Or again, a branch line has been advocated by cordial friends—possibly even by one or two Directors—of the main line. The parties concerned have been sanguine rather than critical, and a large guarantee of interest either on the bonds or stock of the branch Company has been given. There will come within the enquiring investor's observation dozens of cases, in which the capitalized value of the branch (on which interest in some form has been guaranteed) is far in excess of any cold-blooded and critical estimate of its real worth. Suppose six or seven per cent. to be guaranteed on a capital far exceeding the value of a leased line. Next, suppose that competition and Railroad Commissioners so reduce rates that the main line can pay little or nothing by way of dividend on its own stock. The holders of the securities of the leased line have reason to rejoice in their assured income. But the holders of the junior securities of the main line can scarcely be expected to be enthusiastic about it. The uninitiated investor will merely note that careful and conservative boards hesitate very much before committing themselves to such liberal guarantees; but that, under speculative forms of "Control," leased lines have been accepted with astounding avidity.

### *Issue of New Capital.*

The light-hearted issue of unnecessary capital is another point which our simple-minded enquirer will naturally take into consideration. It will, of course, have occurred to him that the tendency of the times is unmistakably to reduce the rate of interest earned by safely invested capi-

tal, in railroads as well as in other forms of enterprise. Where invested capital is practically, though not nominally, earning twelve or fourteen per cent., he will note that such a result is especially liable to suffer from the "changes and chances of this mortal life." Such a rate of interest is, of course, far less likely to be permanently sustained than a rate of four or five per cent. on a sound commercial security. It is at this point and in this connection that his attention will fasten on the question of unnecessary capital, which practically amounts to "water" in one form or another. It is plain that, if a railroad is to-day earning four or five per cent. on any given capital, including "water," while only (say) half of that capital was really and honestly invested in the undertaking, it is, in fact, earning eight or ten per cent. upon the capital invested. It is easy for our enquirer to perceive that the tendency of the times is adverse to the supposition that very heavily "watered" concerns can permanently and consistently pay large dividends on both genuine stock and on a large and light-hearted infusion of "water."

### *Special Contracts.*

If our enquirer is wise, he will probably not be greatly intimidated by the idea of "ghost trains." But he will perhaps discover that, to a certain extent, discrimination in favour of friendly cliques, under the guise of special contracts for transportation etc., is not a mere figment. Possibly he will do well to conclude that abuses of this kind are incidents of a speculative form of "control," but are emphatically discountenanced by every sound and conservative administration.

Let us take, for example, some familiar irregularities which would certainly have been restrained, if foreign

stockholders some fifteen or twenty years ago had been more careful about their direct representation on railroad boards. Let us suppose that a Director on a central board is interested in an unfinished leased line which his company desires to control, or holds shares in a rolling stock company from which his board proposes to hire cars, or has a heavy stake in an oil company with which a special contract is to be made. His personal interest points to a large capitalization and a liberal rental for a leased line, to a liberal rent for cars, or to a low rate for oil under any special contract that may be made. In short, his personal interests are in direct conflict with his fiduciary capacity. No doubt his faith in the value of the subordinate undertaking, in which he has become a shareholder, was the cause of his investing in it. But, just because his confidence in its merits is very great, his estimate of its value is apt to be somewhat sanguine. It would be by no means as critical as the view of a Director who represented *exclusively* interests which would be best subserved by strict economy.

A few years ago the European stockholder did not know enough about American railroads to put his finger on the real points of leakage. He was credulous enough to believe that his railroad did not pay, because American engineers were incompetent, and American officials could not run a railroad efficiently and keep its accounts clearly. Our enquirer is very likely to infer from what he sees that, if European investors had concentrated their vigilance and attention on the wise and conservative administration of financial and board business, instead of worrying themselves about engineering and executive details, they would have saved untold millions of cash, which are to-day, so far as they are concerned, represented exclusively by a mournful experience.

He will pay some attention to the relation which subsists between the real owners of a railroad and the representatives by whom their interests are protected. Suppose him to have acquired his knowledge of railroad administration in England, it will appear to him incongruous that one set of people should have provided all the capital, and that quite another set should control it. In England stockholders commonly build a road out of their own resources; and when they have brought it to such a point of development as to constitute a real security for money, they mortgage it, in the form of bonds, for all that it will carry. Obviously, in such a case, stockholders are the real owners of the property, and the bondholders are their mortgagees. So long as the obligations of the mortgage are properly fulfilled, the bondholder has no reason for complaint, unless indeed the corpus of the security is wasted by the methods adopted for the raising of the interest. But in a great number of American railroads the stockholders had no means of their own out of which to construct and equip a railroad. The foreign bondholders supplied the money; the native stockholder was in clover. He stood to win, and not to lose. If the resources of the district not only grew up to the fixed charges, but made the railroad worth more than its funded debt, the excess of value was the stockholder's profit. If success stopped somewhat short of this, he disposed of contracts to intermediary construction companies, and stood in with them. But whatever profit he made came out of the bondholder's pocket, and, if the enterprise proved a failure, he lost nothing.

It is plain that burthens and privileges are closely correlated. Profit, power, control, patronage, are properly incident to the cash that builds the railroad. When foreign



investors furnished ten or twenty millions of dollars, why not, in every case, have provided for a strong confidential representation and protection of their own interests, with a condition that their representatives should be properly compensated—as an incident of the capital which they provided—before stockholders, who found no money, were entitled to profit? Our enquirer will note that, either in the case of original investment or in a reorganization, the sort of control which will best serve his purpose is the control of the people who find the money, and not of the people who do not.

## CHAPTER IV.

### COMBINATION.

IT has often been said that combination of railroads would tend to undermine the rights of the people, and grievous disasters have been prophesied in its name. An matter of fact, judging by a critical rather than by an emotional standard, we must admit that the disasters predicted have not, so far, come off in accordance with the programme of the alarmists. Whatever dangers may result to society, in a political point of view, from the concentration of vast fortunes in the hands of the few, combination has certainly not issued in the raising of rates. So far, the public at all events has no reason for complaint. It has indeed been objected to combination that power would be centralized in fewer hands; that the limits of possible coups would be enlarged, and the inducement to institute them correspondingly increased; that ampler funds would be available for the caprice of a speculative board; that the representation of parallel and possibly conflicting interests would become less direct and less crisply defined. Further that it would become possible to subordinate the interests of one or another section of a combined undertaking to those of a particular section in connection with which a coup was projected.

Though experience shows that such apprehensions were not wholly unfounded, the obvious answer occurs that dangers of this kind are inherent in speculative control;

and are not valid objections to the principle or practice of combination as such. Given a sound and conservative administration, in which the rights of various elements composing the combined undertaking are adequately and intelligently represented, the dangers feared become shadowy in the extreme. If the holders of the stock of a section were properly represented on the central board, to pet one section and starve another would simply be out of the question. No unjust discrimination in investing funds provided in the interest of the general undertaking would for a moment be tolerated. Speculative investment—(*e. g.*) in coal lands, real estate, unfinished leased lines, or other “fads”—would be resolutely opposed and at once killed by inside and responsible opposition.

It cannot be doubted that the substitution of a central board for two or three sectional boards makes a substantial saving in the cost of administration. If the services of competent men are secured for sectional boards, they must be paid for at market price; and a very cheap article will scarcely answer the purpose. Again, a combined enterprise has the advantage of undivided judgment and unrestricted freedom in laying out its programme of through business. The several sections are under one control, and can be worked with organic unity and precision. The elasticity of existing resources is multiplied. The rolling stock, equipment, staff and general appurtenances can be shifted and transferred with facility. Pressure in one part of the system can be relieved by the superfluous resources of another part. The economy towards which combination tends is not a matter of a day. It operates during the whole three hundred and sixty-five days of the year.

Then again, wasteful or unnecessary forms of competition can, in many instances, be suppressed or dispensed with. While it is quite true that, in the main, competition protects the public against unfair charges, it is possible (in vernacular language) to run this principle "into the ground." The public needs a certain amount of transportation. The best service will be rendered by that system which supplies *exactly what is wanted*, no more and no less. When two competing companies send rival trains approximately from and to the same terminal points, and each is loaded far below the point of paying business, that is *not really beneficial to the public*. Neither of the two companies dares to withdraw its train, lest its rival steal a march. The result is a service inferior from the point of view of the public, because unremunerative from the point of view of the transporting companies. An appreciable amount of power is wasted in unnecessary friction. Combination would enable the rival companies to put on one superior train, instead of two or three inferior ones, adequate to all the requirements of the public at a slightly reduced price, and to make a living profit for their stockholders besides. The encouragement would grow and multiply as development proceeded under the guidance of sound management. It would come to be understood that the interests of the public and of the transporting companies, though not strictly co-extensive, largely overlap one another, and that the best result, from both sides of the question, is that a genuine and satisfactory service be consistently and uninterruptedly rendered at a fair market price. The recurring disturbance of existing contracts and relations produced by the strain of excessive competition, and the uncertainty and disappointment incident thereto, are highly



injurious to prosperous trade and public convenience on the one hand, and to successful railroad administration on the other. It is, in the writer's opinion, a grave mistake to suppose that the inferences derivable from experience really point to the conclusion that railroads judiciously combined or consolidated are less efficiently managed than those which are operated by fractions. As Mr. C. F. Adams Jr. has well pointed out,\* the enlargement of power, judgment and resources is apt to beget an enlarged sense of responsibility. Suppose many years ago the English Government had permitted the combination of the southern lines leading out of London, and had, in consideration thereof, asked one or two minor concessions for the protection and convenience of the public. Does any practical railroad administrator doubt that a better and cheaper service would to-day be at the command of the public, and that the stockholder would be the richer by untold thousands of pounds? No doubt such a combination, in order to be thoroughly satisfactory, would have needed at the outset very skilful adjustment of subsisting interests, and very adequate and balanced representation of those interests for all time. But that would not have formed an insuperable difficulty, if the immense advantages of enlightened combination had been thoroughly understood and frankly accepted.

If the foregoing view be substantially true,—our enquirer will not be at all frightened at the mere fact of combination as such. On the contrary, he will be wise to bear in mind that the unmistakable tendency of compensation to transporting companies is towards a lower, not a higher, level; and that, as a corollary, the investor must expect, as the years go on, to get a lower rather

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\* "Railroads: Their Origin and Problems," C. F. Adams Jr., 1880.

than a higher rate of interest for the money which he locks up in railroads. In selecting his investments he desires, as a matter of course, to evade the consequences of this systematic reduction of interest as far as practicable. The economies which are rendered possible by judicious combination will probably go far towards effecting this object. He will of course have a preference towards those examples of combination which are least liable to speculative control, or to legislative or official interference with competent private management, and which exhibit, in the most effective form, an adequate and permanent representation of legitimate subsisting interests.

## CHAPTER V.

### POOLS.

Our observer will certainly be struck by the importance attaching to the "Pool" in connection with various aspects of investment. Concerning its moral status and its relative necessity or expediency, he will find abundant information in current text-books. The question in which he is directly interested is rather whether the creation of a pool is calculated permanently to solve apparently insuperable difficulties arising between competing railroads of which he holds, or is disposed to acquire, the securities; or whether the mere existence of a pool contains for him adequate reason for alarm or distrust. As in practical business the word is used in a variety of senses, it will be proper to note that the following observations relate not to any speculative or "blind" pool. The objections to which this form of the thing is liable are of that general kind which apply to all forms of speculative control. The pool referred to is simply the expression of a serious necessity which attends the development of railroad enterprise, and may be regarded as a sort of convenient half-way house between internecine competition on the one hand, and wholesale combination on the other. Perhaps the most striking illustrations connected with the subject may be found in the well-known "Granger" cases, and the experience of the railroads affected by them.

A period occurred in the history of America when the

universal cry was "Go West." Prophets of this doctrine took little pains to determine how far west the energetic fortune-seeker should go, or under what conditions as to personal aptitude and accumulated savings he might fairly count on a successful career. As the wave of emigration crept steadily westward, and many pioneers attained substantial success, it seems to have been taken for granted that the farther west a man went the better results would he obtain, and the shorter would be his route to fortune. In the case of the miner, this forecast was often justified. But in the case of the agriculturist serious disappointment was in store. In early days there was an old-fashioned idea that it would not pay to raise agricultural produce beyond a certain distance from a market. This well-founded notion was apparently discredited by a period of reckless activity in railroad construction. Intending farmers settled in districts notoriously deficient in facilities of transportation, apparently forgetful of the obvious certainty that no future railroad would permanently consent to carry their produce to market at a loss. It gradually became apparent that, if the farmer could not obtain transportation at an extraordinarily low rate, his produce would not be worth the cost of transportation, and he would eventually go to ruin. But the construction and operation of a railroad postulates fixed charges. An existing railroad could not honestly be required to carry his produce to market at a loss; and, in face of extraordinarily low rates, railroads in the future would not be built in his district. Under such conditions, it was natural that grave issues should arise between the farmers who desired to get a living, and the railroads which were built for the purpose of making money. The latter had a right to urge that their charters were in fact contracts;



that they had locked up vast sums of money as a consideration for being permitted to run their business in their own way, subject to the fair interpretation of the law of the land ; that their charters formed part of that law, and that it would be a monstrous injustice to deprive them of a large and permanent investment by *ex post facto* confiscatory legislation.

The farmers on the other hand contended, roughly and in effect, that the regulative power inherent in a State entitled its Executive not merely to prohibit abuse or to redress established grievances, but practically to assume the administrative functions of railroad management, such as the framing of rates, adjustment of the difficult problems of competition, and in some instances even limitation of dividends on stock. Every producer, they contended, should be placed on precisely the same footing as regards facilities and cost of transportation, whether he lived far from or near to competitive points, and whether the freight which he shipped was large in quantity and certain in point of delivery, or whether it was small in quantity and so irregular in point of delivery as to greatly multiply the expense and trouble of the transporting company.

The truth would seem to be that it is no part of the proper functions of a railroad to review and correct, at its own expense, the errors in judgment committed by those settlers who selected for themselves spheres of industrial activity ill-adapted to accomplish the purposes of their selectors. Let us suppose that A. has located his farm, flour mill, or lumber mill with genuine insight into the physical conditions which, in the natural growth of the country, tend to ensure success—(*e.g.*), his enterprise is located within measurable distance of water transporta-

tion. It is also near a railroad junction, which promises to become a competitive point of substantial importance. He is plainly entitled to the credit of his forecast—that the conditions of transportation will be permanently favourable to his enterprise, and to the benefits derivable therefrom. Let us suppose that B. has selected a site for his farm or mill very remote from water carriage and from a competitive railroad point. It is possible that a branch railroad may be built sufficiently near to give him a modest chance of limited railroad facilities. But to induce a constructing company to build such a branch line is by no means easy. Perhaps the free grant of the right of way, and of a block of land amply sufficient for *depôt* accommodation wherever a *depôt* may be required, a subsidy or subscription from villages or small towns on the route, and, lastly, a high rate for passengers and freight, may induce a speculative or sanguine company to build the branch or extension under consideration. It is probably constructed with reluctance, and its operation is attended with loss. After it is built, but emphatically not before, B. discovers that A., with the advantages of proximity to water carriage and a competitive point, can reach a market on better terms than he (B.) can ; and he taxes railroads generally with unjust discrimination. In other words, he would like the railroad to shoulder the unfortunate results of his defective judgment. It is impossible to convince him that A. is well placed, because he correctly interpreted the situation, and that he (B.) is ill placed, simply because he failed to do so. Why should a railroad company be expected to compensate out of its own pocket any difference in point of business capacity that may exist between A. and B. ? If a railroad be not bound to do so, it follows, as a logical consequence, that it is no part

of the functions of a State to compel it to do so. The obligation of the State to compel a railroad to undertake gratuitous and costly experiments necessarily falls to the ground, if the duty of the railroad in that behalf be disproved. But the champions of the "Granger" movement could not be convinced of the absolute necessity, not to say expediency, imposed on railroad administrators of charging such rates as traffic would bear.

One school contended earnestly for the theory that all freight should be charged on an absolute basis of mileage, ignoring the certainty that, under such conditions, a railroad could not efficiently conduct its "way" and "through" business, without incurring the penalty of starvation. If its competitive rates were raised to the level of its local rates, it would of course lose its competitive business. If, on the other hand, it reduced its local rates to the level of its competitive rates, it could earn no income sufficient to keep it from insolvency. Another school contended for rates based on cost of service, overlooking the consideration ably pointed out by Prof. Hadley in his excellent work on transportation, that such a course could not permanently tend to the steady and systematic reduction of rates. All freight moved on the basis of the cost of service must bear its *pro rata* of fixed charges. Suppose the fixed charges are honestly and inevitably heavy. The result is obvious: If in America, where fixed charges are often unduly burdensome, this basis had been universally adopted, rates would have ranged much higher than is the case to-day. A third school thought the true remedy lay in the definition by Railroad Commissioners of reasonable rates. But experience only repeated itself, and plainly showed that technical problems, which have for years defied solu-



tion at the hands of the ablest experts, could not so lightly be disposed of by less adequately trained Government officials.

From the poverty of the agriculturists who settled too far from their market arose, to a great extent, the embarrassment of numerous Western railroads with which the foreign investor has a painful familiarity. As time went on, many of these smaller roads recognized that their sole chance of salvation must be sought in combination ; and, in isolated instances, arrangements favourable to the investors in the absorbed lines were eventually made. But, while the consolidation of isolated lines into large organizations was probably beneficial to the country, it tended to define and sharpen the lines of competition between the larger systems. To state the result shortly, several East and West lines, fairly compact in external form, but varying greatly in prospective value and organic symmetry, became very keen competitors for East and West trade. To include them all in one gigantic combination was obviously impracticable, their financial history, intrinsic merits, future prospects, and modes of administration being not sufficiently homogeneous. To fight out the competitive battle to its logical conclusion could only result in starving them all. So the pool was devised, as a *modus vivendi*, by which business which could not give a profit to all should still be so distributed as to give something to each. The basis of distribution differed from time to time, and as a matter of course there were always to be found dissatisfied parties. But, as between the railroads and the public, the result was on the whole beneficial. Stability of rates is, from the point of view of the trading public, second only in importance to lowness of rates. And, if this result could be consistently main-



tained, practical railroad men would see no insuperable objection to pools.

On the other hand, it must be borne in mind that there is no pool without a leak. Although the trunk-line pools in this country have been greatly helped by the immense ability and exhaustive knowledge of Mr. Fink, experience shows the enormous difficulty of keeping fairly in hand such a vast mass of conflicting interests. The truth is that, comparing mileage with tonnage and practicable rates throughout the year, there is not enough to go round so as to satisfy everybody. The stronger company reasonably contends that a pool is devised for the benefit of the weaker. But it is an incident of weakness to fail in seeing ourselves as others see us ; and, if the weak ask too much, the strong are driven to rely on their own force, and to adopt an independent policy. If in a trunk-line pool all parties could agree to abide by the decision of an extraordinarily able Commissioner, and recognize that two and two make four, it is probable that the success of pools in this country would be assured. But, if they are of opinion that two and two make seven, their arbitrator, however able and honest, must necessarily have an up-hill game.

So long as our observer takes note of the practical relation which a pool bears to the securities in which he proposes to invest, he will find no difficulty in protecting his money ; and he may leave the theoretical merits or demerits of the modern pool to the exponents of political economy and railroad administration. He will probably conclude that the necessity for a pool indicates a certain amount of *weakness somewhere*, and that this weakness is most likely to make itself severely felt in the experience of the feebler corporations.

## CHAPTER VI.

### WATER.

MUCH has been written about the ethics of stock-watering, and from this point of view the subject has been pretty well threshed out. But its effect on investment has produced such serious results that it may be thought to deserve a short notice.

Let us suppose that a going concern finds itself in a position to earn 15 or 16 % on the capital invested. The first impulse of its managers will probably be to observe strict reticence on the subject of its profits. To advertise or publish them without reserve would be to directly invite the investment of new capital in the same field, and to produce serious and possibly ruinous competition. A ready solution of the difficulty presents itself. If the capital on which dividend is paid be doubled, and the new stock issued to the original shareholders, instead of paying 15 % on (say) \$10,000,000, it will pay  $7\frac{1}{2}$  % on \$20,000,000. Now, if there existed any law which restricted the amount of dividend payable on a going concern, this process would obviously be a fraud as against the law which created such restriction. But suppose no such law exists in a given case, the infusion of water becomes a question of commercial or corporate tactics. The managers of an industrial enterprise do not profess to be philanthropists. If they can make a large profit without transgressing the law of the land, it is their business to do so in the interest

of their shareholders. If a railroad board can distribute large dividends, their interest in the public is necessarily subordinate to their interest in their own corporation. They may properly contend that all the features of their organization—adjustment of their capital, status of their funded debt, mode of administration, distribution of profits etc.—are all parts of a mechanism which is not an end in itself, but a means to an end. The ultimate assets owned by the company are neither increased nor diminished by the infusion of water. But its component parts are expressed or represented on paper in different terms. It may be that the holders of \$20,000,000 of stock paying  $7\frac{1}{2}\%$  dividend can do better with it on the market than with \$10,000,000 of stock paying 15 %. If the administration be honest and conservative, the infusion of water will not interfere with the productiveness of the concern. If it be speculative and adventurous, more frequent and liberal opportunities will occur for the manipulation of financial coups. To take a well-known instance: before the immense infusion of water into the N. Y. Central system, it was plainly earning an enormous dividend on the capital invested. Even after the infusion of 100 % of water, it paid such large dividends, and was such a strong and flourishing concern, that the projectors of the West Shore Railroad were tempted to scramble for a part of the profits, and were willing to spend a good deal of money for the exercise of that privilege. Whatever may have been the moral or social merits of the late Commodore Vanderbilt's coup, there can be no doubt whatever that the stockholders of the railroad did not eventually lose thereby. So active is the desire of keen trading communities to transfer capital from fading industries to those which appear to be unusually remunerative, that the owners of

very profitable going concerns hold their tongues about their profits till they are ready to sell out to a joint-stock company. It is not the morality of stock watering to which our observer will address himself, but rather the numerous disguises to which it gives occasion, and the disastrous mistakes which it invites and promotes. Millions of dollars have been invested on foreign account in American railroads under conditions which excited the amazement and mirth of the native investor. During one period of great "inflation," it seemed as if a liberal infusion of water rather increased than diminished the value of shares which were unloaded on Europe.

To determine with any thing like precision what relation nominal capital bears to capital actually, honestly, and economically invested in a concern is perhaps too serious an undertaking for the ordinary investor. Life is not long enough, nor opportunities for searching investigation sufficiently accessible, to render such exhaustive research feasible. But, in a superficial survey of American railroads, many instances occur of so striking and unmistakable significance, that very cursory observation may suffice to prevent the more serious class of mistakes. If a railroad company, which has honestly expended (say) \$25,000,000 and has a road worth (say) \$30,000,000 to-day, expects to provide for an indebtedness of (say) \$50,000,000 or \$60,000,000, paying a fair rate of interest, (say)  $4\frac{1}{2}\%$ , it can only do so on the assumption that it does now earn, and will continue hereafter to earn, some 9% on capital really invested. The signs of the times distinctly tend to show that such a result is improbable in the last degree. Great as have been the benefits conferred on the public by the constructors of railroads, the public, which they have served well and in the face of immense risks, will not



pay them at any thing like the rate of 9% or 10% for the capital which they have invested and the services which they perform. If the public will not permanently pay interest on "water," the investor will do wisely to take this circumstance into account. As it may properly be asked, what indications in this direction are afforded by the railroad situation of to-day, the answer is not far to seek. Amongst other leading facts, may be mentioned the drift of State legislation; the institution and expressed views of Railroad Commissioners; the tendency of the people to regard railroad charters as benefits conferred on constructing companies, rather than as unfortunate bargains on the part of the grantees; and the tendency of the courts to push beyond its legitimate limits the regulative power of State Legislatures and of Congress.

## CHAPTER VII.

### PARALLEL LINES.

THE occasional practice of building new lines roughly parallel and in unduly close proximity to existing and successful old lines will possibly attract our enquirer's notice, if only because it throws light on the value and incidents of American State charters. The language of a great number of subsisting State charters is satisfactory, and there is no doubt about the validity either of the compulsory powers conferred thereby, or of the rights acquired thereunder by contracting parties. But it is possible to read and interpret them in the light rather of English parliamentary practice than of the procedure and environment of American State Legislatures, and such a course would certainly lead to misconception.

As everybody knows, a company applying to Parliament for an act to construct its railway must prove the preamble of its bill; or, in short, make out a case sufficient, in the opinion of the Committees, to justify the grant of compulsory powers. Parliament distinctly objects to permit interference with the rights of private property, unless the existence of a public need be proved to its satisfaction; not merely or mainly because certain forms of competition may be unnecessary or superfluous, but on the reasonable grounds that the rights of private owners of property ought not to be lightly interfered with, in default of a public need, and for the mere purpose of

helping a knot of speculators to make money. It follows that, if an act be obtained authorizing the construction of a railway through any given district in England, and the enterprise is usefully and successfully conducted, it would be futile, in the last degree, for a new combination to apply to Parliament for power to build a railway alongside of it. Such new combination could not prove the existence of a real public need ; it would break down in proving the preamble of its bill. But, in the case of American enterprises, we have to deal with a different set of local conditions and, as a corollary, with a different mode of legislative procedure. In America, outside of the members of an old and successful railroad corporation, there is scarcely such a thing as an opponent to the construction of a new railroad. Property-owners of every description welcome its advent. The trader, because it gives additional facilities for the transportation of the produce which he handles. The land-owner, because it multiplies indefinitely the value of the balance of his land. The professional man or casual resident, because it economizes his wear and tear in covering the long distances incident to his life. The right of way can often be obtained for the asking, without compensation, or at the most a very trifling compensation in cases where disturbance amounts to positive inconvenience. In thinly populated districts the location of a station near particular hamlets or large farms is so eagerly desired that the free grant of a substantial number of acres is frequently offered. Townships or even hamlets on the line of a projected railroad are generally willing to subscribe something towards its construction. Members of Legislatures have no inducement to oppose the wishes of their constituents. Practical shrewdness convinces all the natives

that they have every thing to gain, and nothing to lose by the construction in their State of a new railroad. Money will be freely spent during the period of construction, and will be absorbed by local circles. If the enterprise is successful, the whole neighbourhood will be benefitted, and the taxable property of the State will be increased. If it fails or is abandoned in a half-finished condition, the unfortunate constructing company cannot carry away bridges or tunnels in its pocket. The wreck will hereafter be bought up cheaply, and utilized by some local combination. It follows that a State Legislature has no inducement to insist that a company applying for a charter shall prove the preamble of its bill in the technical English sense of the term. If, therefore, a new combination at any time desires to "parallel" an old and subsisting railroad, there has heretofore existed no serious obstacle to the execution of its project, except such as may be found to exist in the financial risks and difficulties inherent in every such enterprise. It is unnecessary here to particularize the results of recent experiments in this direction. It is plain however that, to justify so bold a game, a new combination must hold a very strong hand; and it needs a good deal of judgment to appraise relative strength to a nicety. The new combination may possess large means; but it may also turn out that the old and successful road against which the effort is directed is stronger still. If, for instance, the old company's profits are so large and unvarying as to justify a large expenditure in order to compete for a slice of its income, it is very possibly strong enough to starve the new undertaking. Even granting, for argument's sake, that the rivalry of the new organization is very formidable, and it feels sure of eventually compelling the absorption of its new



enterprise by the old company, the question inevitably arises, *on what terms* can the absorption be compelled, and is the game, as a net result, worth the candle? To-day, as of old, it is prudent to consider whether a board with ten thousand can meet him that cometh against it with twenty thousand. Possibly our enquirer will be right in considering that the compulsory absorption of unnecessary lines virtually amounts to the creation of new capital, which is not desirable, in view of the canons of political economy, and he will shape his course accordingly.

## CHAPTER VIII.

### REORGANIZATION.

WHEN a cynic remarked that "fools build houses for wise men to live in," he was understood to mean, in reference to railroad enterprise, that the resuscitation of wrecked property often gives better results to the investor than the construction of brand new lines. A very cursory observation of the history of American railroads will probably satisfy our observer that the utterance above cited is, at best, only a half truth; but that still the cynic probably knew what he was talking about. He will find no lack of instances in point. The most salient and impressive are cases in which a new railroad has been, in the main, well conceived. Let us suppose that the importance of its terminal points has been considered. Its relations to lines which it intersects, or with which it may hereafter make more intimate and direct connection, have not been overlooked. The volume of trade in a given direction and through a given channel, with fair presumption in favour of quantity and permanence, has been taken into account. Constructive work of good quality has been accomplished—(*e. g.*) expensive grading and here and there costly bridges and structures of permanent value. But on a promising beginning has supervened a financial panic, or a period of hard times, or disunion of shareholders, or some speculative complication. Construction is at first temporarily suspended, and after a time abandoned

*sine die*. The ordinary incidents of receivership, foreclosure etc. follow. As time goes on the outlook affords little hope of any available income or profit to the shareholders. Still a great deal of money has been sunk, and to write this off without an effort would seem to be a somewhat tame solution of the difficulty. Many meetings are held, and generally the smallest stockholders are the most eloquent and positive. The result is reorganization in a form which gives control of the concern to the men who provide the new capital. Now, assuming that a railroad was in the first place fairly well conceived, and has been brought within measurable distance of completion on a basis of (say) \$25,000 per mile, a new combination or syndicate cannot hurt themselves very seriously if they see their way to acquire the enterprise on a basis of (say) \$10,000 per mile. The advantage accruing to the new syndicate is not confined to the mere pecuniary cheapness of the acquisition. They succeed gratis to a vast aggregate of valuable experience for which their predecessors paid highly. They know more about the general and local possibilities and the correlative drawbacks of the enterprise than their predecessors could possibly know at the outset, and they get this knowledge without paying value received for it. On the whole, resuscitation appears a more comfortable theory than creation, and results are often found to justify this forecast.

On general principles then our observer will not be deterred from investing in reorganized concerns by the mere fact that their past history has been disastrous. He will make a few superficial enquiries which may be necessary for his protection, the answers to which will readily occur. For instance, he will note as a matter of course the amount of good money honestly expended on the

property, as distinguished from outlay incurred through intermediate construction companies, extravagant temporary loans, and other complex financial arrangements; its relation to the new capital proposed; the probabilities of reasonably prompt completion, and therefore productiveness within a measurable limit of time; and the nature and extent of the control proposed to be given to the persons providing the new capital. Next, it may be worth his while to enquire how often and to what extent an embarrassed railroad which it is intended to resuscitate has done duty as a factor in prior reorganizations. He will note that, in many great combined schemes, there have been several weak and comparatively worthless sections of line which were intrinsically and of their own nature destined to insolvency. With a really clever clique of capitalists possessing large means and influence at the helm, this circumstance has in many instances presented no insuperable obstacle to the ultimate manipulation of a great coup, involving the unloading of worthless securities on European investors. Again a wrecked line, well conceived at the outset and intercepted in its career of success by panic or accident, may have been employed as a serviceable stalking-horse, and its attractiveness already exhausted. For instance, after it has been bought up cheaply, the trumpet is freely blown and a lively tune is played on the theme of its intrinsic merits. It is now-once more warranted to carry—almost exclusively—the vast business of (let us say) the far West to the Eastern seaboard. Once more the unspeakably wealthy districts which it will “tap” are indicated on an appropriate map. The dense black line on this map, which indicates the route of the new figure-head portrays, with its new connection, a line so nearly straight, or (in the



current argot) is so nearly a "bee-line," that one marvels how it can be possible that a single ton of freight should go by any other route. It will be enough for our observer to compare this dense black line with the ordnance map of the United States. This will possibly give him some new impressions on the subject.

In connection with the "tapping" business, it may occur to him to enquire whether this process has not been repeatedly performed on the favoured district during the last few years. He may perhaps reflect that, while "tapping" is essentially a festive process, it makes all the difference to a thirsty man whether the barrel is full or empty. He will also do well to enquire what are the incidents of recent receivership. These sometimes make serious calls on the resources of a demoralized road. The annals of receivership record enormous claims for compensation of receivers,—among the largest being in a heavy case \$750,000 for seven months' service. Our enquirer will be disposed to prefer systems which, if they cannot pay a dividend, are somewhat more economical in their view of the compensation likely to be claimed for official service.

It will sometimes occur that a relatively heavy assessment on the stock of a distressed railroad is proposed. Our enquirer, if he hold such stock, will do well to consider a proposal of this kind somewhat carefully. It may of course be worth while to protect his stake in the concern by paying the amount required. But he will bear in mind that, in a large majority of cases, the stock which he is asked to protect really represents, not actual outlay, but a contingency dependent on the net earnings of the railroad over and above working expenses and fixed interest on the bonds by means of which the road itself

was built. It may be that the value of the stock is purely speculative ; useful for the purposes of the " Street," but of little merit so far as the chance of a dividend is concerned. Again, the destination of the money to be raised by assessment is worth attention. If it is to be strictly devoted to urgent repairs, improved equipment or the like, the investment may be worth making. If it is to be appropriated to the acquisition of speculative property, or to the protection or development of collateral assets, a single assessment will not permanently stop formidable gaps ; and the process of taxing shareholders may be repeated at an unexpectedly short interval. The privilege of holding unproductive stock on the terms of assessment recurring at short periods may be somewhat too costly.

*Per contra*, the submission to assessment by stockholders may sometimes enable them to greatly strengthen their position by suitable arrangements with the holders of junior funded securities. The stockholder, who has ready money wherewith to meet a real emergency, may see his way to greatly fortify his position in a reorganization. The possession of cash, and the courage to invest it at a time of need, clothes him with special importance and power. No doubt the owners of prior securities hold the fortress and the big guns. But, in a period of emergency, the owner of ready money controls the ammunition. He is a very useful man in view of an immediate fight. If the resuscitated railroad has already done duty as a figure-head in one or two combinations which have resulted disastrously, the observer will be disposed to extend his enquiries somewhat more closely to the actual duty which it is at the moment called on to perform. Perhaps it may be incorporated in a new combination to facilitate the floating of a " blanket " mortgage. It is

very commonly an incident of a "blanket" mortgage that it covers under its ample folds one good section of line and several bad ones. If such a case should come under his notice, and he is the holder of sectional bonds of the sound portion of the proposed combination, he will do well to stick to them for the present. He need not be afraid of further investment, because it is probably very desirable to the holders of a great number of weak securities to float a "blanket" mortgage; and the holders of bonds of the sound section are virtually masters of the position. If they have ready money besides, they should control the reorganization and have things pretty much their own way. No very deep or close enquiry is necessary to guide our observer in determining and identifying those cases in which the lemon has been squeezed dry. Financiers have made several coups in them already. The most speculative think they will not pay for another squeeze; and the confidence of the foreign investor is already well-nigh exhausted.

Superficial enquiries of the kind indicated above tend to prevent some of the most familiar and disappointing forms of investment in resuscitated American railroads. They may equally tend to indicate that resuscitation, reorganization and combination with new elements are not, by any means, necessarily prohibitory factors in connection with projected investments.

## CHAPTER IX.

### PROXIES.

AMONGST other obvious conditions which have made speculative control possible, our enquirer can scarcely fail to be struck by the circumstance that, in the past, there existed a remarkable divorce between the possession of stock and the voting power properly incident thereto. It is of course true that some fifteen or twenty years ago there was not the same craze for direct representation in every department of life or business which characterizes the life and politics of to-day. But it will strike him as a strange thing that one set of people should have paid for and own the stock of a railroad company, and that the voting power should be retained by Directors who, by virtue of that very fact, would have the option of running a railroad in the interest of a speculative clique, instead of in the interest of its real owners. The injury which in the past has accrued to foreign investors from the existence of this system of course admits of degrees, according to the circumstances of each particular case. But, in very extreme instances, the results have been in different aspects both disastrous and ridiculous. Take, for instance, the case of the Erie Road in the palmy days of the notorious Erie Ring. A corrupt Legislature at Albany controlled by Mr. Tweed and his friends had passed the Erie Classification Act, by virtue of which only a small proportion of the Directors could be retired at annual elec-



tions, thus leaving the power incident to a majority chronically vested in a compact and highly organized party. Now it happened that the Company had no power to issue directly an unlimited amount of new stock at the discretion of Directors, who might for any reason desire to water the capital. But, by the manipulation of a power vested in the corporation, it was permissible to issue bonds convertible into stock; and this power, from the point of view of the Ring, was sufficient for all practical purposes. The mode of procedure was, on an electoral emergency, to issue (say) five or ten millions of dollars of convertible bonds; next to convert them into stock, and then to leave the stock standing in the name of one or more of the Directors or their brokers or agents. The certificates were sold upon the "Street" at a nominal price, and passed from hand to hand. But, if presented for transfer, they were retained in the office of the Company under the pretext of "verification" etc., until the election in view of which the new stock was issued had passed. Of course, for the purposes of the immediately pending election, the voting power was vested in the Director, broker or agent in whose name the stock stood on the books of the Company. Purchasers of the stock certificates, having been precluded from obtaining transfer till after the election, were altogether out of the hunt. The party in control of course voted on the stock thus detained for "verification," and equally of course voted their own re-election. The late Mr. Jas. Fisk Jr. is reported to have said that he could never be turned out of his seat in the Erie Board, so long as he owned a printing press. This is of course an extreme case; but it serves to illustrate the principle that a divorce between the legal ownership of stock and the voting power which is its

proper incident is an unhealthy symptom in the life and administration of a corporation. If, on the eve of an election, stock which has little or no value (except for speculative purposes) is bought up by the party in control at (say) forty cents or fifty cents on the dollar, it is impossible to resist the conclusion that permanence of control must, for some reason or other, be a very desirable thing to a party which is willing to pay so large a price for the exercise of power. If our enquirer is induced to look up this question and to ascertain for himself why any stock, which does not pay a dividend in the present and has little prospect of doing so in the future, should possess a large marketable value, he may perhaps acquire information which may be of use to him in his future investments. Nor will he fail to note that "controlling" parties, who are willing to make considerable sacrifice for the acquisition of stock necessary to maintain them in power, are diligent in the promotion of the system of proxies. The reasonableness or unreasonableness of the proxy system must of course, in the last resort, depend upon the reasonableness or unreasonableness of the delegation of the trust which is involved in voting power. It will not be denied that the exercise of voting power is, in every case, the exercise of a trust. Every trust contains within itself an element of duty and of responsibility. Every improper or rash exercise of a trust affects to a greater or less extent the interests of other persons more or less numerous. It may well and often does happen that the delegation of power by proxy is in every respect legitimate, proper and expedient. For instance, the administration of a given railroad may have been for many years past in every respect trustworthy, efficient and successful. In such a case, the delegation of a controlling

vote by proxy to one or more Directors who are deservedly entitled to the confidence of shareholders is a wise and entirely justifiable step. The trustees of the interests of stockholders have represented those interests to the best of their power, and have earned the confidence of their *cestuis que trustent*. But, in cases where the history of a railroad has been marked by the unmistakable incidents of speculative control, the proxy system is necessarily fraught with danger.

Our observer will, in the course of his casual enquiries, read some of these proxies, and he may perhaps observe that they affect to pledge the giver of the proxy to something like a power irrevocable within a given number of years, or even irrevocable absolutely. He will (not unnaturally) ask what inducement there can possibly be for the Trustees—or practically the servants of the stockholders in a company—to desire comparatively permanent pledges in respect of a tenure of office, which can only be desirable to shareholders so long as it is thoroughly understood by them to be held for their exclusive benefit, and in the prosecution of interests neither directly nor indirectly outside of their own.

## CHAPTER X.

### FUNDING.

IN his casual survey our observer will note the great number of enterprises which are hopelessly overloaded by the volume and incidents of their fixed indebtedness. The experience of the most successful English railways certainly points to the conclusion that the adjustment of a reasonable or even heavy measure of fixed charges is not an insoluble problem. It does not necessarily cripple the credit or impair the efficiency of a well-managed railway, provided the rate of interest be not unduly burdensome. But he will note that, in many American railroads, while the senior securities receive an extraordinarily high rate of interest, sufficient to take the marrow out of the concern, the junior securities have nevertheless multiplied to an extent quite passing the belief of the ordinary observer. It goes without saying that the holders of prior securities would always welcome a large extension of the interests held by posterior encumbrancers. "But why," he asks, "should junior securities have been heaped up at such an unconscionable pace, and to such an incredible amount, relatively to the value of the undertaking?" The true answer may perhaps be indicated as follows: The trade of America, of which railroads are more or less a barometer, has undergone many grave vicissitudes, which it is unnecessary to specify in detail. To keep a concern going under grievous pressure often needed immediate and



liberal outside assistance, and the foreign investor was known to be, as a rule, dogged and staunch in protecting investments to which he had committed himself. The prior and best securities in American railroads were generally held by native capitalists, and the posterior and more risky ones were unloaded on Europe. The spirit of a familiar precept contained in the Levitical law\* seems to have been appreciated by the native capitalist in connection with dead or moribund concerns. "Ye shall not eat," says the precept, "of any thing that dieth of itself: thou shalt give it unto the stranger that is in thy gates that he may eat it; or thou mayest sell it unto an alien."

Now the native holders of these prior securities naturally maintained a very hopeful attitude of mind. If they had not felt great confidence in the future of their country, they would not have retained even prior securities. But they believed that times would mend and that existing troubles would be only transitory. Their confidence in their investment was confirmed by the consciousness of special strength derived from the *priority* of their securities. They felt that sort of trust in Providence which a poker player is supposed to feel when he holds four aces. Every thing which they could do to stimulate the confidence of investors in junior securities they conscientiously and consistently did, short of reducing the rate of interest to which their own securities were entitled. They insisted on the temporary character of successive depressions, and said re-assuring and often witty things about the future of their railroads.

If, when collapse and stoppage of effective work were imminent, foreign investors had insisted on measures of

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\* Deuteronomy, xiv., 21.

funding, sufficiently drastic to place a railroad in a condition to bear its fixed charges, they would have occupied an indefinitely better position to-day. The command of ready money, sufficient to stave off a disastrous crisis, is an immense screw power recognized to a greater or less extent even by prior encumbrancers. A modest interest in a solvent going concern is often more satisfactory than a larger interest in an enterprise which may at any moment become unproductive or insolvent. If there be any truth in this view, the proper time to assert it commonly occurs when ready money is urgently needed. If such an opportunity is missed, it may possibly not recur; for finance, like whist, rarely forgives a blunder. In a vast number of instances occasions suitable for drastic measures of funding were overlooked. And so it came to pass that the native investor sat down quietly in the enjoyment of his seven or eight per cent., and advised the junior encumbrancers to settle it among themselves. He prudently withdrew from the strife

. . . "ere close of day,  
And bade the rest keep fighting."

To ask prior encumbrancers to concur in funding arrangements of drastic character is of course to ask a great deal. Sometimes the mere magnitude of an undertaking renders it improbable that prior encumbrancers will fail to get their coupons paid for several years to come. Of course, the greater the value of posterior interests, the greater is the probability that the first mortgagee will be saved harmless. As long as he gets his seven or eight per cent. on bonds which he originally bought at prices far below their face value, he has every reason to be satisfied with the *status quo*. Delay is altogether

in his favour, and the energy developed by persons who desire to include him in funding arrangements seems to him repulsive, not to say unchristian. On the other hand, a railroad of large mileage, burthened with excessive capital and in inferior working condition, is not an article which, in the event of a foreclosure, every investor (even a first mortgagee) would wish to acquire or could use with effect. There is something of the white elephant about it. It is not given to every one to handle a white elephant as Mr. Barnum did. Capitalists possessing enormous resources might, in rare instances, be able to do so,—in the confident expectation of persuading the public to shoulder the heavier portion of the weight to be carried. But nothing short of exceptional ability, backed by liberal supplies of money, could cope with the situation so as to make a profit. Probably in the long run a thoroughly liberal adjustment, by funding the fixed indebtedness of an overburthened enterprise, would be best for all parties, even though it postulated exceptional foresight and generosity in respect of sacrifices and concessions which would be inevitable. The history of a great railroad may fairly be regarded as covering a large area in national growth and development,—far larger than that which is embraced by an individual life. There is both need and room for a long range of foresight, and for a corresponding generosity in the interpretation of prospective, sometimes very remote, conditions. Our observer will note that the wise adjustment of fixed charges is an element too important to be lightly passed by. The price of money, popular sentiment, trade depression, and in short the general tendency of the times point to the conclusion that railroad profits in the future may suffice to pay reasonably good and safe interest on fixed indebtedness;

but that, if the encumbrancer expects a rate of (say) seven or eight per cent. on bonds which were originally bought at (say) sixty per cent. of their face value, or seven or eight per cent. on the capital of leased lines which were capitalized and taken up at prices representing two or three times their value, there cannot be enough to go round.

That the holders of junior securities get very little in any given year is not the worst feature of the situation. It has been said above that reasonably large fixed charges at a moderate rate of interest were not disadvantageous. The reasons are sufficiently simple. Outlay which ought to be charged to capital account can be so charged and provided at a moderate rate of interest. This leaves in the hands of the administration a large fund of ready money, which is of incalculable value in the conduct of their business. All that they need to purchase can be purchased in the most convenient market, of the best quality, and at the lowest prices, *for cash*. Labour is liberally and regularly paid, and the railroad service is improved thereby. The floating debt is not permitted to accumulate unfairly; nor paper put on the "Street" at extravagant rates of interest. The cost of incessant litigation, varied by an occasional receivership foreclosure and reorganization, is avoided. The immense economies, which are possible to a solvent road paying only reasonable interest on its fixed indebtedness, and employing its earnings so as to utilize the maximum purchasing power of ready money, go far not only to make the road generally successful, but to clothe its securities with stability. It may be worth noting that where American railroad securities have shown stability for some years, there is a very strong presumption of an indefinitely progressive increase in value. Ex-



ceptional circumstances may, of course, interfere with such a result. But, as a general rule, a railroad which has for some years produced a steady profit has an excellent chance of uninterrupted advance in prosperity. Everybody realizes that demand creates supply. It is sometimes worth bearing in mind that supply in turn creates demand. A sound railroad administration, and the effective service incident thereto, attracts to itself fresh accretions of business, not merely because the business of the country increases and grows up to meet the outlay originally made in construction, but also because peace, stability and credit are substantial factors in commercial success.

Of course, it may be said that many railroad corporations which do not hold this creed hang on to life and, to a greater or less degree, satisfy the aspirations of their shareholders. That is no doubt true to a certain extent. But satisfaction in the present is heavily discounted by the confident forecast of difficulty in the future. A railroad which is hopelessly overburthened must some day or other face the axioms of the multiplication-table, and recognize that two and two make four, and not five. Take the case of a railroad which finds itself to-day unable to meet its funded indebtedness without immense prospective sacrifice. To make any show at all, it must let its track and equipment run down. It is strongly tempted to disguise to a greater or less extent its floating debt, and to ignore engagements on paper which have not matured. Its credit is impaired, and the purchasing power of paper is very inferior to the purchasing power of cash. It is constantly liable to the incidents of hostile action; it must get ready money somehow, and it gets it at an exorbitant price. When the end eventually comes, it is quite cer-

tain that somebody will be badly hurt. You cannot reasonably expect a syndicate to find money for a sinking concern, without adequate compensation and approximate security. But, if the situation is radically a false one, it is extremely doubtful whether it is worth while to prolong the agony. Our observer will do well to make note that the necessity of drastic measures of funding and the possibility of carrying them out may afford him profitable subject for reflection in connection with railroads in which he holds, or proposes to acquire, an interest.

## CHAPTER XI.

### RECEIVERS' CERTIFICATES.

A FORM of security in which a good deal of money has been made and lost is the Receivers' certificate. It may be said shortly, that investment in this form of security is good for the inside, and somewhat risky for the outside, investor. It goes without saying that the strength of the Receivers' certificate is the priority over all previous encumbrances with which it is invested by the special action of a court of competent jurisdiction. The validity and completeness of the order creating it is a very simple matter, calling for no special business knowledge. But other considerations occur which our enquirer will do well to note.

The purpose of this special form of security is to meet a grave emergency,—so grave that, in the opinion of the Court, it is entitled to take precedence over mortgagees. To arbitrarily set back the priority of a first mortgagee is obviously a tremendous exercise of power, and can be justified only by strict vigilance and close examination of the urgent need which it is proposed to meet, and by the enforcement of unconditional compliance with the orders of the Court. Suppose it to happen (and in the writer's experience it has often happened) that the certificates were duly issued and, so far as the face of the documents were concerned, were in every respect satisfactory. Let us suppose next that the proceeds of such certificates, instead of

being expended on purposes within the four corners of the order, have been diverted to other purposes. The chances are that the holder of the certificate will have to fight his battle with the first mortgagee, and is very likely to get nothing out of it beyond some valuable hints for his future guidance. Our enquirer's rough conclusion will be to invest freely in Receivers' certificates when he is inside, and to leave them alone when he is outside.



## CHAPTER XII.

### CORNERS.

FIFTEEN or twenty years ago the effect of a well-organized corner was so tremendously drastic that it was apt to leave an enduring mark on subsequent railroad history. But of late years, owing to increased publicity and a more general diffusion of knowledge on the subject of railroad business, the occurrence of an effective corner is comparatively rare. Only at very long intervals are the special conditions necessary for complete success found in juxtaposition. A successful exhibition of the process postulates as a matter of course, first, the existence of a market in a particular stock so active (in its speculative sense) that extensive short sales have been made, and the amount of such sales must bear a very large proportion to the total amount of the particular stock. Secondly, the campaign must be engineered by fairly strong and adroit manipulators. Thirdly, these must be able to rely with reasonable confidence on the entire good faith of their confederates. The leading conditions being fulfilled, it is easy to see that the quiet acquisition or control of the whole or nearly the whole of the stock of a given company will enable the holders to squeeze the short sellers, and make them pay for their release whatever price may be demanded. It has been discovered however by experience that the combination of these necessary elements is very rarely perfect at all points.

Although the holders of nearly all the stock of a company—in connection with which a corner is projected—may feel that they are logically in command of the situation, their corner may be broken by an irregular issue of new stock. This was the method pursued with much effect by the late Mr. James Fisk Jr. Or again they may be conscious of holding nearly all the stock of a company, and have orders in the market to buy up the small outstanding residue at comparatively high prices. This they can afford to do in view of large profits to be realized hereafter. But presently they discover that there is apparently no end to the amount of stock which they can purchase at these comparatively high prices; and it eventually dawns on them that this high-priced stock which they have lately purchased has been unloaded on them by one of their own confederates. On the whole, it may be considered—for practical purposes—that the old-fashioned corner, in its highly picturesque and dramatic development, is played out. More or less remote imitations of it are still in vogue. But the enquirer will probably be well advised to leave the corner business alone. Outside meddlers with a corner may generally count on getting hurt in one form or another; and, apart from the doubtful morality of the transaction, the investor will generally find that the game is not worth the candle.

## CHAPTER XIII.

### PUBLICITY.

WHILE it would be idle to suppose that publicity is a specific for all kinds of irregular or defective administration, it is, to a certain extent, rightly associated in the investor's mind with open and straightforward management. The kind of discrimination which has incited public sentiment to favour drastic legislation against railroads would have been in a great measure restrained by the action of publicity, if applied in due time and by well-chosen methods. A judicious and business-like tariff, framed not necessarily by Railroad Commissioners but by skilful and responsible railroad officials, would of course have failed to give universal satisfaction; but it would have afforded all sections of the public the same kind of chance within certain well-understood conditions and limitations. Thus, for example, the right of a transporting company to recognize a distinction between wholesale and retail business, between large quantities of freight delivered at regular intervals, and small quantities uncertain or capricious in point of delivery, would only need the condition of publicity to make it work fairly. It would soon come to be understood that, in pursuance of established commercial canons, the wholesale regular shipper has an intrinsic right to better terms of transportation than the small and irregular shipper. If I want a single dinner provided for me by a restaurant keeper three

days in a week, but am not sure on which days in the week or at what hour in the day I shall require it, a business man will arrange to supply me at a reasonable price. But, if I extend my order to fifty dinners a day of the same quality, to be ready certain at two o'clock every day for three months, it is plain that I have a right to expect more favourable terms. The difference between wholesale and retail interchange is a recognized factor in all departments of supply and demand; and it is difficult to see why transportation—considered as a commodity—should be exempted from the rule, except in cases where it becomes part of an organized national service, like the Post-office or the Telegraph in England. Obviously the making of profit is not essential to a public service of the latter kind, but merely incidental to it. If a profit is made, so much the better. But, if loss accrue, the ratepayer is in the last resort responsible for a deficit. If a public service established on this basis chooses to ignore the distinction between wholesale and retail business, it is of course at liberty to do so. It is not so clear that a State has any right to compel a trading company to ignore this distinction, when it has specifically recognized its position as a trading company, and has accepted a large valuable consideration in exchange for powers conferred under a charter. The advantage of publicity in such a case would be to make quite clear to everybody the terms on which a transporting company could effectually do its business. It would accentuate the proposition referred to above, that it is no part of the business of the purveyors of transportation to equalize at their own expense the inevitable difference between the strong and the weak trader. The wisdom or unwisdom of embarking in a particular line of industry ought to be judged of by each individual trader



on his own responsibility, with direct reference to his own business aptitudes, capital and environment, and not by the transporting companies of whose services he desires to make use.

While in the case of soundly administered companies a yearly report is found sufficient for all practical purposes, it cannot be seriously supposed that such a mechanism is an adequate protection to the average investor. Let us suppose the case of a speculative administration which, with the aid of its outside friends, has decided to put up the stock. Their track and equipment are badly run down and need large outlay to restore them to average working condition. But their gross receipts are actually, and their net earnings apparently, large; and as the party in control have decided to put up the stock, it is thought desirable to pay a dividend on preference shares in aid of the projected boom. The day for an annual report is approaching. What is to be done about the floating debt? It is nominally stated at (say) three or four millions of dollars. But the equipment needed for the new "boom" will run it up to (say) six or seven millions. Now, suppose all the rolling stock and equipment that is needed be procured by means of paper maturing after the date of the official report. These are of course engagements and liabilities which must some day be met, but they are not strictly debts, because the paper has not matured. Our imperfectly informed enquirer may well imagine the annual statement to represent the condition of the floating debt, and may invest freely. But when the next annual report is made he discovers that he knew very little about the true condition of the floating debt at the time of making his investment. Here again it is not impossible that publicity derived from quarterly statements might conduce to the

protection of the investor. A financial coup in a speculative stock needs a reasonable time for incubation, and the intervention of publicity at short intervals is very unfavourable to the successful manipulation of such coups. Of course cases occur in which the party who control the speculative road and temporarily own the majority of its stock contend that they do not desire aggressive publicity, but prefer to run their own business in their own way. That might be a conclusive answer to any thing that the casual investor could say, if it were not for the fact that he and his class are precisely the people upon whom the securities of the speculative company will be presently unloaded.

The prevalent divergence in the method of keeping railroad accounts is a matter which will probably be sooner or later dealt with by Congress. It may, for the present, be dismissed with the remark that nothing short of inside knowledge will enable the enquirer to pursue this subject with appreciable advantage. If this question, coupled with that of Inter-State commerce, be subjected to a new and special type of regulation, the effect of publicity will be very largely increased. It is thought possible by some observers that the formal legalization of pools would produce satisfactory results, in the direction of publicity and a clear understanding of the subject by all classes. But on this point no forecast can at present be made with any approach to confidence. It may be prudent however to note in passing that, when railroad companies hold substantial interests in various kinds of property not immediately connected with the purpose of their corporate existence, a very sanguine view is apt to be taken in official reports of the market value of collateral assets. There may be, for instance, included in the list of assets

large blocks of securities connected with leased lines, or with property which it is thought may some day be valuable for terminal facilities, or perhaps coal or mineral land, or real estate in projected new towns. The business of a transporting company is, as a rule, most effectually conducted, when attention is exclusively given to the matter in hand and not to collateral undertakings. In these days it is a sufficiently difficult task for a railroad company to conduct its proper business on a paying basis. A transportation company cannot, in the long run, profitably become the owner of the produce which it is its business primarily not to produce but to transport. Exceptional cases will of course occur in which it may be possible to run under the same "umbrella" all kinds of incompatible elements. But, from the investor's point of view, business of this kind is a fertile source of mistake and confusion. The railroad, which spends a good deal of time and energy in hauling about material which it produces, may make a good show on paper; but inferences derivable from a superficial view of its nominal earnings are very likely to be illusory. Again, the valuation of collateral assets only indirectly connected with the business of a transporting company is very apt to be sanguine and excessive. Nothing is more common than to find that, if an effort were made to realize them in discharge of floating debt, their immediate market value would turn out to be merely nominal, and their prospective value altogether too remote to deserve the confidence of an intending investor. New acquisitions, new construction, new additions to mileage or accommodation form the proper subject-matter for an enlightened increase of funded debt at a reasonable rate of interest. When extraordinary weight is attached to them, as a set-off to an

excessive floating debt, an intending investor is put on his enquiry. It may well happen that these new acquisitions represent money which under a sound administration should have been appropriated to repairs. No more wasteful or dangerous method, from the investor's point of view, can be adopted than to allow the track and equipment of a going concern to run down, and to excuse or disguise such a result by a showy statement of new acquisitions or collateral assets. It is a method which points to receivership and insolvency as truly as the needle points to the pole.

Our enquirer will probably come to the conclusion that the drift of the age is in favour of exclusive attention to the particular matter in hand, and he will be inclined to prefer those forms of administration which do not go, to any large extent, outside of their proper business.



## CHAPTER XIV.

### RAILROAD COMMISSIONS.

BY far the most important change in the status of railroad property which has taken place in recent years turns on the adoption of the Railroad Commission. The bearing on railroad property of this institution must be sought, not so much in the *principle* of a Railroad Commission—which is probably right,—as in the remarkable variation in point of degree, which in different States characterizes the powers conferred on the Commissioners. For instance, between the advisory method successfully adopted by Massachusetts and the somewhat peremptory exercise of power which prevails in Georgia there is a great gulf fixed. Whichever form may be preferred by the intending investor, it is plainly worth his while to bear in mind that the jurisdiction of a Railroad Commission is a very elastic thing; and it will be prudent for him to give some attention to its principles, its incidents and its possibilities. The issues raised by it are important in principle and far-reaching in practical result; *e. g.*, Is a railroad corporation which has built a road at its own expense simply a purveyor of transportation whose status is defined by formal legislation, or is it an agent of the State and a trustee for the people? To whom does the increment of value properly belong? Does the admitted power of the State to assume ownership of railroads on payment of compensation involve the right to assume

their virtual management without giving either compensation or indemnity against losses resulting from defective or unfortunate State intervention? If the State undertakes to reduce the earning power of a railroad and to annex a portion of the increment of value, can it fairly prescribe the expenditure by corporations of additional capital and the improvement of existing accommodations, outside the requirements of public safety? Is "regulation" substantially a corrective process, or is it broad enough in its application to railroads to supersede a charter?

\* The mode in which these questions are practically answered by State legislation is a matter of grave importance to foreign stockholders. If they are held to be traders or purveyors of transportation protected by valid contracts, they can take care of themselves by reasonable vigilance. But, if the earning power of their railroads and the amount of their dividends are liable to be indefinitely reduced or restricted by the State, while the entire responsibility for losses is left on their shoulders, then their position is not without serious difficulties.

The assertion by a State of a right to fix rates and limit dividends by *ex post facto* legislation, without regard to existing charters and without compensation or indemnity, is, in fact, the barely disguised assertion of a right to confiscate \* to a greater or less extent the increment of value legitimately accruing to a going concern. In connection with a railroad the increment of value cannot with any semblance of propriety be described as an "unearned" increment. In a vast number of instances an American railroad may be said to create the settlement of population which is destined to furnish passen-

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\* Binghampton Bridge Case, 3 Wal. 51.

gers and to produce freight. Reflex activities are of course stimulated, and contribute in their turn to the development of traffic; but in many instances the railroad itself primarily constitutes the determining condition of settlement in a particular place, and of the transportation of passengers and merchandise through a particular channel. Subject to the restraints of equitable regulation, the right of a constructing company to the increasing benefit of the business, which it builds up by its outlay and its skill, is no less real than that of the founder of a purely commercial or professional business to the increasing benefit of his capital or ability. If it has undertaken extraordinary risks in consideration of the special protection of a charter, statutory rights are added to its natural equities.

To transfer in whole or in part the increment of value of a railroad by *ex post facto* legislation, without regard to existing charters and without giving equivalent of any kind, while decrement is allowed to take care of itself, is to say the least of it a strong measure. It constitutes a new departure in respect of the rights and incidents of ownership. It involves pecuniary incidents of great immediate value, and suggests remoter political inferences in respect of the definition and rights of property, which it is impossible to regard lightly.

The return of comparative prosperity in railroad enterprise, which ensued after the severe depression incident to the great panic of 1873, brought with it conditions calculated to excite possibly not alarm, but certainly vigilance.

A formidable indictment, including counts in respect of discrimination and extortion, was brought against transportation companies at the instance of the people; and

very drastic treatment was recommended, with an emphasis too cordial to admit of misapprehension. So long as this movement was confined to occasional complaints conveyed through the press or to isolated action taken in the courts, railroad managers regarded it lightly. But as soon as it was seriously taken in hand by several State Legislatures, the subject assumed a graver aspect.

The agitation of a popular grievance in a State Legislature has, ere now, been known to result in legislation altogether more sweeping than the champions of the grievance originally desired or deserved. Excited feeling is often an indispensable agent in accelerating the correction of abuses ; but it is a dangerous basis for hasty legislation touching rights of property. It is too often unrestrained by accurate knowledge and unchastened by fair discussion ; and is therefore frequently uncritical and sometimes unjust. Searching criticism and a calm review of relative rights are conditions essential to sound and permanent legislation. In the absence of these elements, it sometimes happens that, by the hasty adoption of unsound principles, mischief is done in a single Session which it needs the labour of many years to repair. No doubt the "heroic" mode of treatment has its merits, when applied by a master-mind under very special conditions. But experience shows that, in cases involving the nice adjustment of complex and conflicting interests in property, it is apt to be somewhat heavy-handed. The laws of trade and the traditions of commercial good faith recognize a close relation between burthens and privileges, risks and profits. Special legislation, which purports to modify this relation to an appreciable extent, should at least be deliberate and well-considered. Again, the laws of supply and demand require special care and insight for their correct interpre-



tation. The statesman who seeks to evade or postpone their natural operation by the creation of an artificial mechanism, is undertaking to interfere with laws which do not readily lend themselves to external regulation or control. The whole subject is complex and difficult. Rash and hasty treatment of it is likely to involve injustice on the one hand and short-sightedness on the other.

If this be so, it may be worth while to note the tenour or drift of popular aspiration in connection with this most important subject. This may be roughly formulated under the following heads, of which some have already obtained legislative acceptance, and others are recommended as subjects for immediate conference between the Railroad Commissioners of several States, with a view to more extended and uniform legislative action.

1st. The institution of boards of Railroad Commissioners with unprecedentedly large powers involving the assumption of important directorial functions. The cost of their maintenance to be paid by the railroads subject to their jurisdiction.

2d. The formal incorporation into the statute-book of the several States of the proposition that "a railroad is a public highway, the property of the people." As incidents thereof,

3d. The right of the people by their Commissioners to fix rates, settle tariffs and revise special contracts.

4th. The like right to limit dividends *in advance*.

5th. The right to direct from time to time additional expenditure by corporations, in order to furnish such improved accommodation as may be deemed suitable for the public *convenience*, outside the requirements of public *safety*.

As regards No. 1, it may be broadly stated that the

better opinion in America favours the institution of Railroad Commissions, provided their powers be confined to "regulation," as the term is commonly understood. Subject to this condition, no objection would probably be made to a special tax on railroads for maintenance of such Commissions, though it may be doubted whether this expense be not properly chargeable to the public (State) revenue. Nor would serious opposition be offered to a maximum rate for freight and passengers, if special equities were provided for. A sound Commission, competent to judge of evidence and free from party bias, would probably, by its mere existence, prevent more grievances than it would ever be called on to redress. But, in order to accomplish this result, its judicial characteristics should be essential and predominant, and its political characteristics accidental and subordinate. It should be empowered to interpret rights of property, not to make or unmake them.

Although discrimination or extortion cannot for a moment be defended, it is a matter of some importance that these offences should be clearly and equitably defined. Much litigation has already arisen out of the question, how far transportation companies can be properly charged with discrimination for observing the familiar distinction between wholesale and retail and between constant and spasmodic business.

The tenour of recent decisions is, so far, adverse to the claim of the transportation companies that they should be at liberty to carry at special rates freight which they can handle with special ease and cheapness.

The proposition (No. 2) that "a railroad is a public highway, the property of the people," is a somewhat equivocal proposition, and is susceptible of a great variety

of interpretation. Its soundness, and the limitations under which it can be unequivocally affirmed, can of course only be determined by reference to the history and status of each individual railroad; but it is notorious that a very large group of railroads were constructed under substantially identical conditions. Let us take an instance fairly typical of a large class, and examine its genesis.

A State contemplating its vast undeveloped resources was struck with the astounding contrast which existed between its great potential wealth and its comparative lack of cash. An obvious solution readily suggested itself—viz., that the need of the moment was effective transportation. But the construction of an adequate railroad system postulated a large immediate outlay of cash, amounting possibly to many millions of dollars; and that was precisely the element which the State did not at the moment command. The question arose, "who will become producers or purveyors of transportation?" Native capitalists took up the challenge, and associated themselves with foreign investors; but it was felt that the risks to be incurred were very serious indeed. Rival roads might be built; commerce might, by the operation of unforeseen conditions, be diverted from its customary channels; panics might render the permanent locking up of capital dangerous or even fatal to the credit of the investing capitalist; the period of productiveness might be indefinitely postponed by delay in construction; and then dissatisfaction of shareholders might develope into disunion, and result in irretrievable loss. But still intending producers of transportation were willing to accept these risks, if a satisfactory inducement and protection were offered in the solemn form of a charter. It was admitted

that the State would, under a charter duly offered and accepted, become a lawful contracting party ; and that the Federal Constitution (herein more conservative than the British Constitution) imperatively forbade State legislation which should "impair the obligation of a contract." \* Relying on such assurances, foreign capitalists were not afraid to lock up large sums of money. The "public highway the property of the people" was not yet surveyed or located. Its precise route—with the exception of its terminal points and general direction—was a question for the discretion of the chartered company. The right of way, in many instances the freehold of the soil over which the railroad was to run, construction, equipment and rolling stock were all paid for in one form or another by the company. If the railroad were sold or leased, the purchase money or the rent confessedly belonged respectively to the vendors or lessors, and not to the State or its people. Whatever the right of the State or the people to a railroad so constructed may have been, it was certainly not a *proprietary* right, sufficient to authorize compulsory assumption of control, without some equivalent being given in the form of compensation or indemnity. The owners of a limited right, privilege or easement in connection with property are of course entitled to have it effectually protected ; but it does not follow that, in order to save the trouble of devising a mechanism suitable for such protection, the real owners should be divested of the management of their property. It is proverbially a subversion of the natural order of things that the "tail should wag the dog."

A good deal has been said about the obligation of common carriers to serve the people in accordance with

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\* Federal Constitution, Art. I, Sec. 10,



ancient law and custom. No doubt, in the absence of a charter, this obligation might substantially govern the question. But the grant of a charter was a statutory enactment, the formal act of the people. It created a specific contract, changed the law of the land, and altered the relative situation. It was competent to a State to permit all sorts and conditions of men to establish commercial enterprises at their own risk, subject to the *general* law of the land including (amongst other things) the laws and customs relating to common carriers. It was equally competent to the State, in any given case, to pass a *special* act embodying a specific contract, and thus to define the privileges and to determine the status of a particular enterprise by the express terms of statute law. For reasons of its own,—which results have shown to be wise reasons,—a State in certain cases thought proper to adopt the latter course. To claim the right to confiscate privileges thus conferred or to change the status thus protected, by appealing to *general* laws, is something like setting up the statutes relating to intestacy against a devisee entitled under a confessedly valid will.

It may be pertinent to observe closely what, in such a typical instance as above mentioned, the State *did not*, as well as what it *did*, offer by way of inducement to capitalists to accept extraordinary risks. It emphatically did *not* say: You are invited to become the occupiers of ancient highways; the railroad in which you invest your capital will become the property of the people, and you will be virtually their tenants at will. It did *not* say: If you fail, or as long as your enterprise is unproductive, your loss will be all your own; but, if you succeed, you will always remain exclusively liable for losses, while your profit will be limited by the people at their discretion. It did *not*

say: You are invited to sink large sums of ready money in the construction of permanent works on American soil. Any increment in value which may hereafter accrue to your railroad will be dealt with as the people think best.

What the State *did* say was of a very different kind. It said in effect: It is competent to us to exercise the right of eminent domain for the public good. We say that, in view of a great public need, the present is a proper case for such exercise; and, if you will lock up some millions of capital for our benefit, we can lawfully offer you the power of recouping yourselves by the product of your railroads, to be realized under your own management and distributed at your own discretion. The increase of our State wealth which you will effect for us justifies us in giving you this solemn assurance in the name of the people, and in making it part of the statute law.

By such an arrangement the inherent power of the State to "regulate" was not for a moment waived, but the interchange of consideration between the State and the company was emphasized. The State did not by becoming a contracting party abdicate any of its functions as a State; but it brought itself, *quo ad* the subject-matter of a particular contract, within the provisions of the Federal Constitution, and thereby conferred on contracting companies the right to protection in the Federal courts.\* It cannot be doubted that, if it had been sought to import into a charter at the date of its grant any one of the conditions first above formulated, such charter would have been declined with thanks by intending grantees. Results have conclusively shown that charters granted to railroads have proved enormously beneficial contracts to those States

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\* The Bridge Proprietors *vs.* The Hoboken Co. 1 Wal. 116.

which were fortunate or far-sighted enough to obtain willing grantees.

As regards No. 3, nobody doubts the power of a State to assume the ownership of railroads upon proof that such a course is for the public good and upon payment of just compensation. Nobody questions its right to institute appropriate tribunals for the redress or prevention of wrong and for the purposes of "regulation," properly so called. But the representatives of chartered interests may not unreasonably object, if "regulation" be so construed as to warrant a compulsory divorce between ownership and management, which would leave them wholly responsible for losses, but deprive them of the correlative power of realizing and controlling profits.

They may properly contend that a tribunal authorized to redress or prevent wrong is an expression of the sovereign power compatible with corporate ownership; but that a Commission authorized—in the face of existing charters—to fix rates and limit dividends would wield powers incompatible with the control essential to the free enjoyment and successful management of corporate property. If State officers are empowered to settle tariffs, restrict dividends, and order additional outlay for purposes outside the requirements of public safety, it is obvious that the solution of leading problems of railroad administration will be practically transferred to the State. It will be competent to the State to determine the earning power of a railroad, the dividends payable on its stock, the distribution between the people and the corporation of the increment of value, and perhaps the liability of stockholders for further expenditure. But the entire responsibility for losses incident to defective or unfortunate State management will be left

on the shoulders of the corporation. It must be admitted that this would be an experiment in paternal government, which might or might not be wise, but which, if made at all, must be made at the sole risk of the corporations.

Nor, in view of the relations subsisting between labour and capital, is this risk by any means trivial or imaginary.

To refer to a well-known instance (cited below \*), the Supreme Court of the State of New York has recently decided that corporations can be compelled by mandamus to handle *promptly* all freight offered for transportation in the face of a strike of the freight-handlers. In a city which receives and distributes an enormous amount of produce, this is a very serious obligation. If a corporation be thus bound and liable for losses arising out of delay in moving sensitive or perishable freight, it must—in order to economize such losses—either pay such prices for labour as strikers insist on, or procure unskilled labour to do their work. Now, where a corporation can control its own tariff (within the limits of a liberal maximum), and thus protect itself against emergencies, the obligation to handle promptly all freight offered by the public is a measurable commercial risk. But, if a State *which does not actively discourage labour combinations* neither permits corporations to protect themselves by raising rates to meet the fluctuations of the labour market, nor itself bears any portion of the loss arising from its official adjustment of the tariff during the existence of a strike, it creates a divorce between management and responsibility. It disarms the

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\* Attorney-General *ex. rel.* People of the State of New York *vs.* N. Y. Central and Erie R. R. Companies. Not reported at date of writing.



corporations by official intervention, and then leaves them solely liable for the losses incident to their disarmed condition. It assumes a leading administrative function, without accepting the correlative responsibility for loss. The corporation must procure labour at such prices as it can, under pain of heavy damages, but it may charge for transportation only what the State prescribes. The tale of bricks is not diminished, but the maker must gather stubble where he can find it. If this be so, it is perhaps not unreasonable that, if the corporations remain solely liable for losses, they should resent the transfer of important administrative functions from responsible proprietors to elective State officers.

It would be idle to pretend that in America the general results of government administration in any sphere that can be named compare favourably, in respect either of economy or efficiency, with those of private administration. The conclusions of Parliamentary Committees in England are, on the whole, unfavourable to government interference with railways outside the limits of "regulation" in the ordinary sense of the term. The chances of success would be still further reduced if a government arbitrarily assumed leading administrative functions, but left with corporations the entire liability for losses incident to defective or unfortunate State management. Would any thoughtful person seriously contend that you could advantageously "regulate" the business of the Bank of England by transferring the control of the bank rate to a government official? The truth would seem to be that discretion and responsibility are true yoke-fellows, and each performs best in the company of its mate.

From the point of view of a railroad corporation, the

wise adjustment of rates is the seed-time, and the distribution of dividends is the harvest. Knowledge of administration is not a mere aptitude, but an acquirement; and it would seem that the self-interest which is an incident of proprietorship supplies more trustworthy incentives to sustained effort and to the development of technical skill than can be looked for in disinterested government administration. A chartered corporation may, in many cases, fairly contend that it has legitimately acquired for valuable consideration the exclusive right to manage its own property in conformity with law; that its charter is part of that law; that its executive is specially trained for its purpose; and that amateur dry-nursing by the State would at once impair its business and increase its expenditure. It may urge with some reason that, if the State desires to administer a railroad, it has the right to become its proprietor\*; but that, before it can justly assume the functions of proprietorship, it must first become a purchaser. *Ex post facto* legislation, involving a compulsory transfer of property or right without compensation, needs to be supported by singularly cogent reasons if it is to command the assent of fair minds.

It must not be overlooked that the power of a State to compel the good behaviour of corporations within its jurisdiction, without having recourse to the assumption of administrative functions, is very large. Moreover, even if a corporation behaves well but makes a very large profit, the State can compel the transfer of ownership to itself by purchase. Consequently the profit which can be realized by any given corporation cannot permanently exceed the limit at which it becomes to the interest of the State to

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\* Pontchartrain R. R. Co. *vs.* Orleans Navigation Co. 15 La. Ann., 404-413.

assume ownership. This is in itself a power of no mean cogency. But its indirect value is increased by the circumstance that the corporations possess no correlative power to compel the State to purchase. The possession of such a power would of course have furnished them with an appreciable measure of protection, because the State would be very cautious in modifying privileges or enlarging risks to which it might hereafter succeed or be subrogated by the action of the corporations. In the absence of such a power, it is no doubt more advantageous, from the point of view of the advanced reformer, for the State to control profits and decline risks than by assuming ownership to take over profits and risks together.

As regards limitation of dividends (No. 4), it is obvious that rates might be so "fixed" by the representatives of the people that any discussion relating to dividend might become superfluous. But the power claimed under this head deserves special notice, because it presents a tangible issue between State legislation and the Federal Constitution, and accentuates the hardship which might through its operation be inflicted on companies.

It will not be denied that, in the case of many existing charters containing no specific provision as to limitation of dividend, the more or less remote prospect of the amplest dividend possible under the charter formed a real factor in the consideration offered by one of the contracting parties and relied on by the other.\* Such prospect was, in fact, the commercial equivalent for the acceptance of extraordinary risks. It needs some courage to contend that legislation, which gratuitously confers on Commissioners the power of indefinitely limiting this prospect,

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\* Binghampton Bridge Case. 3 Wal. 51. See remarks of Davis, Ch. J., as to purposes of grants to corporations.

does not "impair the obligation of a contract," or that "regulation" is broad enough to cover the confiscation of valuable rights of contract.\* It is indeed said that Commissioners would always be competent and trustworthy. But, assuming that to be so, it does not answer the objection. A corporation subjected to arbitrary external control is no longer master of itself, but is, in principle, placed at the mercy of others outside its organization and having no proprietary interest in its welfare. It is not necessary to contend that Commissioners would be *likely* to exercise their powers wrongfully or even capriciously. It may be quite true (and in the writer's opinion is true) that the Commissioners heretofore selected by the States which have in part or in whole adopted the programme of reform are honest and competent officers. But the objection is that existing rights of property cannot fairly be made by *ex post facto* legislation to depend on the exercise of official discretion.

It is obvious that an honest fluctuation in the constitution and opinions of successive Commissions might well produce serious injury. Suppose the case of a solvent corporation which to-day pays seven per cent. on its stock. Three Commissioners might to-day decide on a limit of ten per cent. That would be reassuring, and the stock might retain its market value. Within six months two of those three Commissioners might die or become disqualified. Their successors might be of the opinion that, whatever the conclusion of the former Commissioners might have been, they now, in the light of new evidence affecting the history of the road, consider three or four per cent. a fair limit. The conclusion of the Commissioners might be perfectly conscientious; but what

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\* Green vs. Biddle. 8 Wheat 1.



becomes of the non-resident stockholder or trustee who has pinned his faith to a charter? The data to which, in extreme cases, it is proposed that Commissioners shall have recourse in determining the dividend payable, include broadly all the antecedents of a railroad—the cost of its construction, the financial history of its securities, the conditions and method of transportation, and many other details which it is unnecessary here to specify. It is enough for the present purpose to point out that regulation as a corrective of abuses is one thing, and regulation as a mask for the confiscation of vested rights is quite another.

Nor would the evil in such a case cease with the first loss inflicted on the stockholders. The future stability of the value of their securities would be grievously shaken. If you want to undermine the prosperity of a solvent corporation or to check the recovery of a depressed one, you cannot do better than legislate away whatever stability its securities possess. Thenceforward they become a football for the "Street"; and there is a prospect once in every five or ten years of a foreclosure accompanied by unlimited litigation. The foreign stockholder contributes his share towards paying the piper, but he has practically no voice in the selection of the tune.

Apart therefore from its legality, such legislation as last above mentioned has the serious fault of tending to shake public confidence and to alienate foreign capital. Nor is its constitutionality, from the point of view of a State itself, entirely free from doubt. The modification of chartered rights—not as a penal measure but for the public good—is a legislative, not a ministerial act. The question inevitably occurs, Can a State lawfully and constitutionally by *one act* delegate for a *term of years* to

Commissioners, to bankers, or to a fiscal agent, the *continuing* power of finally deciding what, from time to time, is or is not for the public good? Is the power of Eminent Domain susceptible of unlimited delegation as against reluctant third persons; and, if not, what are the limits? It may be noted in passing that to impose a special tax on stockholders, in order to provide the cost of limiting their dividends, savours of hardship. It is rather like seething "the kid in his mother's milk."

If the irregularity complained of be extortion or discrimination, legislation limiting dividends would seem to apply a corrective in the wrong place. It is, on the whole, more tolerable to restrict the method of farming than first to encourage unrestricted outlay by the farmer and then to confiscate part of his harvest. If legislative coercion be needed, it is the business of the statesman to see that it be applied in the right place; that the mode of application combine the maximum of force with the minimum of friction; that his remedy be proportionate, in point of severity, to the irregularity complained of; and that it will not (except where an explicit penalty is imposed on the wrong-doer) irreparably injure the fortunes, or impair the public efficiency, of the enterprise to which it may be applied. Restriction of dividends, considered as a remedy for discrimination or extortion, can scarcely be taken to fulfil these conditions.

Mature consideration of the subject of Railroad Commissions is to-day tending towards a preference for the grant of moderate, as distinguished from extreme, powers. Though the opinion of the United States Supreme Court at Washington must, on the whole, be taken to incline towards the law laid down in the "Granger" cases, there are wholesome symptoms of dissent from that somewhat

extreme interpretation of the law. In any event, an intending investor will do well, before selecting any particular State as a sphere of investment, to examine the powers conferred on Commissioners and the exercise made of them as embodied in their annual report. He will probably conclude that advisory, or even moderate compulsory, powers exercised by competent men are thoroughly beneficial to railroad property, but that the grant of drastic powers involves many perils and risks from the investor's point of view.



## CHAPTER XV.

### VESTED INTERESTS.

AMONG the most striking traits of the American national character are the singular elasticity with which it recovers from disasters, and the rapidity with which it throws the past behind its back. Few more remarkable passages of history can be found than that which records America's resurrection after the close of the great Civil War. Long before people had ceased to discuss its tremendous incidents, the nation was again in full march towards prosperity and wealth. Again, the Chicago fire was a very sharp and decisive calamity. But a new city arose from the ashes with unprecedented speed, and in the twinkling of an eye the past was left behind. This kind of recuperative power reasonably inspires the foreign investor with courage and hopefulness. But the observer will be apt to note that facility in throwing the past behind our backs is a more or less two-edged weapon. From the investor's point of view, it is a serious question what is the subject-matter that is thus easily forgotten. If it is a loss or a toothache, well and good. If it is a mortgage or a valuable consideration, the memory and benefit of which ought to be permanent until they have been respectively discharged or recognized, the case is somewhat altered. Perhaps the most striking instances of this short memory have been afforded by States which have, in whole or in part, repudiated loans of which they were sorely in need at the time



of contracting them, or have repudiated subsequent compositions assented to by both lenders and borrowers after a fair consideration of the circumstances proper to the particular case. Instances are not lacking in which the lenders' rights have been frankly disregarded, in spite of the fact that the very railroads on which the borrowed money was expended had for years been largely contributing to State wealth, and are doing so to-day.

Securities of this class, although their amount is not inconsiderable, will probably possess a very limited interest for our enquirer. He will therefore be content to note one or two salient points connected with current controversies. These may be worth passing attention, because they illustrate to some extent the incidents of State rights in their bearing on broader questions of vested interests in property generally. First, then, he will do well to bear in mind that a State claims the rights and immunities of sovereignty. An aggrieved person who desires to sue a State may find himself checkmated by a great variety of tactics. Under certain conditions a State may decline to permit itself to be sued—except in courts possessing a particular jurisdiction—in respect of a claim the merits of which it does not explicitly deny. That is a serious disappointment to a suitor who is perhaps a good swordsman and would like to fight his opponent according to the established etiquette of the arena. He has issued his challenge, but his opponent politely declines to fight. The Executive of the State claims to be, in a certain sense, at once the trustee and the servant of the sovereign people. It can meet the challenge of a suitor with a simple "*Non possumus*." That is a line of defence very difficult to break down, because, by availing itself of this mode of obstruction, the State need not take into account the

specific merits of a suitor's claim. There is left to the aggrieved person an appeal *ad misericordiam*. So long as he is aware of the limit of his power, "forewarned is forearmed." But it is always weak, and sometimes dangerous, to confuse the right of entreaty with the possession of a valid remedy. Concerning his rights in the Federal courts one or two comments will be found below.

But the obstructions which the suitor may meet with in any effort to enforce his alleged rights are not confined to the power of the State Executive to decline his challenge. He has to reckon with State Legislatures, and therefore with demagogues of many types who (side by side with many honourable and distinguished Statesmen) sit therein. In the hands of a clique of demagogues, who are described in vernacular language as "on the make" and who have their own axes to grind,—a mode of procedure which may be roughly described as "hook and eye" legislation is a tremendous engine. This designation is simply adopted for lack of a better term, and is not sufficiently clear to justify the writer in dispensing with some words of explanation. Its distinctive feature consists in the notion of carrying by two or more separate and distinct bills a measure which would certainly be rejected if its principles, purposes and incidents had been considered as a whole. It is easy to the adroit manipulator of legislative procedure so to marshal and to arrange the sequence of his bills that the first instalment of the proposed legislation in view appears not only harmless, but absolutely patriotic and noble. Once grant that the first instalment is meritorious and has become law, the second follows as a logical sequence. Yet, if both the bills had been considered together, the net result would have been palpably unjust, and legislation promoting it would have

been certainly rejected. But by the "hook and eye" system a result, which the Legislature would not approve *as a whole*, can be smuggled through by instalments. Perhaps an illustration may make reasonably clear a situation which it would be difficult to present intelligibly in abstract form. Let us suppose that a clique of repudiators desires to evade the obligation of a State loan. To announce this view explicitly would be to invite defeat. How shall we go to work to pass the bill we desire? The following is a mere illustration. Patriotic member states that the moral sense of the community is in favour of an equitable compromise with the State's creditors. He therefore proposes to issue new bonds to the holders of State securities, in exchange for old outstanding bonds which will be destroyed in due course contemporaneously with the new issue. A proper mechanism is devised for surrender and exchange, and outstanding bonds are freely surrendered. That is the "hook" side of the proposed legislation. Now for the "eye" side. There now comes to the front a member even more patriotic than the first. He is weary of the economical extravagances of the opposite political party. They have committed, he says, a sin which no patriot ought to overlook. They have allowed payments of interest on State loans to be made, without being passed on by the people, and without a specific appropriation by the Legislature for every one of such payments. His duty to his constituents compels him to protest against such an outrage, and to erect, so far as may be, some kind of constitutional barrier by which this wave of partisan extravagance may be checked. The people, he says, acting through their elected representatives, ought to pass on every such important and vital payment. It is their duty as well as their privilege to do

so. He therefore begs to introduce a bill by virtue of which the Treasurer is forbidden to make any payment from the Treasury on account of State indebtedness, unless or until a legislative appropriation has been made for that purpose. This proposal he makes with reluctance. But it is so obviously essential to economic reform in the State, in the Legislature of which he has the privilege of sitting, that he has no hesitation in asking the support of the House. His emotion is unmistakable. No one doubts his sincerity, because he tears his hair and smites the table. The bill is passed on purely patriotic grounds. The "wire-puller" has the satisfaction of seeing that he has fitted the "hook" into the "eye." The result is that the holders of the new bonds get nothing. But this result could never have been obtained if the subject had been considered as a whole.

Partisans in this country who favour the dark and sometimes tricky tactics of State legislation are flattered by the belief that their system has the countenance and approval of so great a statesman as Mr. Gladstone. His proposal to pass his bill for extension of suffrage first, and then—with the help of the logical inferences and the preponderating strength derived therefrom—to settle the distribution of seats in his own way, is thought here to be about the best illustration of "hook and eye" legislation which the world has so far witnessed. Of course, tactical skill in interpreting the conditions of parliamentary procedure will always prevail in democratic communities, whose form of government lends itself with peculiar facility to the adroit manipulation of rings. But experience shows that the best way to meet this complication is frankly and fairly to show up the trick; and as far as possible to debate revolutionary measures in full view of



their incidents, conditions and whole environment. As a matter of course, the bills introduced in the Virginia Legislature—and popularly known as “coupon killers,”—have the benefit of relationship to Mr. Gladstone’s method. But they scarcely commend themselves to the minds of those observers, who think that adroit manipulation of parliamentary procedure ought not to be allowed to obscure or supersede the ultimate objects which both Parliament and procedure are designed to answer. In America, as in England, too much weight is attached and too serious incidents are permitted to arise out of mere adroitness in the management of legislative and parliamentary details. As the whole concern, including party government, tenure of office by particular men and so forth, is, in the last resort, merely a part of a mechanism intended to secure good government and substantial justice to all classes of the community, “hook and eye” legislation is plainly a thing to be deplored on principle; no matter whether the “coupon-killing” Virginia Legislature or Mr. Gladstone be considered its most skilful exponent.

An equally good illustration is afforded by another aspect of the controversy between the foreign bondholders and the State of Virginia. Programme of “hook” bill: Propose a settlement on the basis that the coupons of State bonds are to be available for payment of State taxes. Make this proposal on highest known moral grounds connected with the integrity, the dignity and the unswerving good faith of a great and sovereign people. The proposed legislation is at once morally fine and—within limits—peculiarly satisfactory to the bondholders. But the “eye” bill, which appears at least as high-toned in its purposes and aspirations as its predecessor, deplores the romantic circumstance that innumerable

forged coupons are floating round, and proposes that no coupon shall be receivable for taxes until it has been subjected to the test of an ordeal which virtually deprives it of its value. The coupon-holder, forsooth, is asked to pay his taxes in cash and submit his coupon for official investigation. If the "hook" bill and the "eye" bill had been considered together, and their incidents investigated as a whole, the injustice of the net result would have been apparent and its absurdity would have ensured and expedited its funeral. The stock argument that State loans were frequently issued by legislatures which did not represent the people is at once too musty and too feeble to need more than a passing word. A sovereign people devises for itself the political mechanism which it considers most suitable to its requirements. Outside parties have rightly no voice at all in determining its justice, adequacy or efficiency. It follows that no State can properly set up the imperfection of its own machinery against innocent third parties, who had every right in the world to suppose that a sovereign people would elect its government in its own way, and would be responsible for the incidents of its representative character. It was probably rather on the strength of this than of any other argument that the English people paid the "Alabama" claims. What is sauce for the goose is sauce for the gander.

There is another set of securities on which our enquirer may think it worth while to make one or two passing notes, viz.: those which consist of American land, either purchased outright for the purpose of mineral or agricultural operations, or accruing to railroad corporations under the system of land grants. It is scarcely necessary to point out that the interests of foreign investors in

lands held under the latter system vastly exceed in amount those acquired by direct purchase.

The tendency, above referred to, to forget or ignore the valuable consideration contributed by the foreign investor in payment for his interest in land-grants forms a very striking feature of legislative activity in America to-day. A great deal has been said and written about the rapid decrease of the vast domain owned by the United States, and its absorption by corporations including a large foreign element, or by foreign purchasers in their own undivided right. It is said that the land held by the United States is immensely valuable to-day; and that this circumstance shows up in strong relief the wastefulness and absurdity of parting with any of it to railroad corporations or foreign investors. If the gist of these remonstrances merely amounts to the statement that, in the alienation of government lands, there has been much extravagance and some jobbery, no one intimately acquainted with Washington business will for a moment doubt the substantial truth of the allegation. The point that strikes the observer most forcibly in connection with this contention is that the vast and valuable consideration paid by the persons who are interested in railroad grants is either deliberately ignored or unaccountably overlooked. Let us examine for a moment the conditions attending a railroad grant of the most conventional type. In a given State the United States Government owns several millions of acres. A great part of this vast tract is intrinsically, in a potential sense, very valuable; in some places rich in mineral wealth, in others abundant in valuable timber, and again in others admirably adapted for agricultural development. Desiring to realize from the sale of these lands a reasonable contribution to the national ex-

chequer, the United States Government repeatedly offered them for sale at fabulously low prices. The answer of the really practical judge of values was consistently unfavourable, and purchasers could not be found. No doubt the land was rich in intrinsic elements of wealth; but it lacked one vital condition of success, viz.: proximity to a system of transportation which would enable the producer to get money or money's-worth for his produce. Suppose you have an immense deposit of minerals in an inaccessible part of the Rocky Mountains. Suppose that the expense of constructing a railroad to a point within measurable distance of this deposit renders such construction out of the question. For all practical purposes in the present, you may as well have a deposit of ore in Saturn or Jupiter. If you haul your produce to a market by mules, its value will be eaten up long before it gets to its destination. Tons of magnificent corn have been burned in the Western States as fuel, simply because the cost of transportation would have exhausted its worth before it could reach a market and become subject-matter of exchange. This is the sort of illusory value about which American patriots of the "spread-eagle" school talk so largely. The United States Government, however, took a different view of the problem, and this view was in principle very similar to that which induced individual States to scheme for the development of their own internal resources, and to invite the introduction of the foreign investor under conditions indicated in a former chapter. It reasoned something as follows: Here is a district possessing all the conditions favourable to immediate settlement and ultimate wealth, if only we can supply the vital need of transportation. To lock up any thing like from five to twenty million dollars in the construc-



tion of a railroad involves tremendous risks. The States in which these lands are situate have not at present cash adequate or available for so great a work ; nor, if they had, would their people be content to accept so serious a hazard. Yet perhaps we may find some foreign investors with sufficient courage to accept these great risks, if we give them a subsidy in land ranging from six to fifteen miles from the track of a projected railroad and continuing throughout its length. By this method we sit down quietly at home, and permit the foreign investor to shoulder incalculable risks. Such a course combines, in a remarkable degree, national patriotism with economic prudence.

Mr. Artemus Ward has made the world familiar with the soundness of this view. He says, in effect, that he had no overpowering personal desire to go to the war. But a fine sense of duty precluded him from actively opposing the desire of his wife's relations to go if they so desired. Now our government map divides the land into sections of 640 acres each. If we give to the constructing company alternate sections of land within the limits above referred to, or larger limits if necessary, in consideration of their building a railroad, the residuary sections which we retain will be doubled, trebled or perhaps quintupled in value. The Government of the United States will suffer no pecuniary loss, because the balance of the land which we retain will (by reason of the creation of a system of transportation) be worth vastly more in the market than the whole property was worth prior to the gift of a portion. From the point of view of the United States Government, "*πλέον ἡμῖν παντός.*"

It is a monstrous injustice to describe this interchange of consideration as an ill-considered and extravagant sacrifice of property on the part of the United States. It is indeed

scarcely credible that any candid observer intimately acquainted with the commercial history of American States can seriously contend that, on the whole, this policy has not indefinitely accelerated the settlement, development and general improvement of the several States in which it has been liberally carried out, or that, in the long run, the grantor has not gotten substantially the best of the bargain. To reason from the analogy of English railways is plainly absurd, because in England settlement and civilization preceded railway construction, while over large tracts of the American continent the exact converse has been the case. In the West and South the construction of a railroad has almost invariably, in fact, though subject to great variation in point of degree, been the pioneer of civilization. Its advent in a new district has introduced new ideas and personalities, new individual ambitions and social aspirations, new phases and standards of thought and obligation. It has largely tended to produce order out of chaos, to set up a standard of social law and public opinion in the roystering mining camp, and to inform with energy and enterprise the sleepiest agricultural village. By its operation the taxable property of States has been increased so as to meet progressive educational and humanitarian demands. The resources of municipal corporations have been enlarged so as to enable them to cope with the requirements of public order and decency. It would indeed be difficult to portray the advantages which railroads have conferred upon remote and scarcely civilized districts, without recourse to language bordering on the melodramatic. That is not the purpose of the present notes.

It may indeed be said that a subsidy of land offered by the Government to a constructing railroad corporation is

undistinguishable in principle from any other forms of taxation. That proposition may be quite true, and may be freely granted to the opponents of the system, for whatever it may be worth. But suppose that a popular government sees nothing immoral in indirect taxation, or in protection of particular industries, or in any other fiscal adjustment, which in its opinion tends to the development and ultimate independence of the whole nation, and with which the verdict of the majority of the people is in accord. Opinions will of course differ as to the correctness of the principle. The irreconcilable free-trader will regard it as a frightful outrage. On the other hand, States pledged to protection will consider it an unmixed benefit. There remains, after all, an open question which the majority considers to have been right in principle and beneficial in result, and which the minority denounces. You cannot cut up a principle by citing its abuses. Neither the majority nor the minority contends that extravagance or jobbery was in any respect justifiable.

The signs of the times indicate fair recognition by the people of the United States of the benefits which the Country has derived from the investment of foreign capital, and of the protection to which that capital is entitled. If, under that form of popular government which the American nation has devised for itself, Congressional, Legislative or Municipal rings have been permitted to make an undue profit out of the national resources, that can afford no sufficient reason for ignoring or failing to protect the legitimate interests of the foreign investor. It is probable that, if the latter would assert firmly and temperately the importance of his rights, with due regard to their real merit and general conditions, he would obtain as fair a hearing in America as elsewhere. In

order to do so successfully, it is incumbent on him to appraise with some approach to correctness his real equities and the vitality of the remedies appurtenant thereto. If, for example, he were desirous of protecting his interest in State bonds as against a State showing a disposition to repudiate, he would probably have a better chance to-day than at any time within the last ten or fifteen years. *Per contra*, if he should propose to induce the Federal Government to pay his Confederate bonds, his prospect of success would be in the last degree visionary. He will possibly conclude that, in the long run, "wisdom is justified of her children," but that they are not always identifiable at first sight.

#### *Western and Southwestern Grazing Lands.*

Advanced reformers have spoken very frankly about the necessity for drastic legislation in connection with property in the Far West and Southwest held mainly for grazing purposes by individuals or corporations representing a large amount of foreign capital. The truth would seem to be that the outcry is addressed not primarily against the legitimate ownership of property, but against an unfair interpretation of the rights and privileges incident to such ownership. The occupiers of large ranches possessing grazing privileges defined by the custom of the Country are of course subject, like every body else, to the obligations of written and unwritten law and custom. If, in the exercise of a grasping spirit, rights are transgressed, the trespasser has placed himself in a false position. If privileges have been abused or rational customs set at nought, the party in fault must reasonably expect to be more or less coerced by such forms of remedy or restraint as the social conditions of the community in which he



resides permit and justify. But the coercion or restraint of a trespasser on legal rights or social institutions is a matter which stands on its own merits. It throws no appreciable light on the security or insecurity of property owned and held in accordance with law. Our observer will probably conclude that law-abiding men who have honestly acquired interests in property in the Far West or Southwest can, if they choose to adopt the proper means, protect their interests there as effectually as elsewhere. Whatever views they may be disposed to take concerning property already in possession, it may be considered as a foregone conclusion that legislation restricting the acquisition of land in large quantities by aliens (whether in an individual or corporate capacity) will assuredly be carried out. A comprehensive bill dealing with this subject is, at the time of writing, before Congress, and is, in substance, practically certain to pass both Houses. It is scarcely necessary to say that restrictions on the future acquisition of land by aliens need excite no apprehension as to the observance of the foreign investor's rights in the property of which he has become the legitimate owner prior to the passage of the bill referred to.

## CHAPTER XVI.

### STATE CONTROL.

Is there any truth in the forecast that, within a measurable limit of time (say five or ten years), the railroads of this country will be taken over by the Government, and managed in the future as part of one great national system composed of railroads, post-office and telegraphs? If such a result should be accomplished, on what conditions would the transfer be made; and in what manner and to what extent would the interests of the foreign investor be affected thereby? There are not wanting competent judges who hold that the three best known forms of inter-communication above referred to form a natural trio, and are peculiarly susceptible of successful and harmonious combination. Great economies, say the partisans of this school, could be effected if these three branches could be made to play into each others' hands. Fewer buildings would be needed for post-offices and telegraph stations. A smaller staff would suffice for the combined work, and the services of each member would be more adequately utilized.

By the opposite school it is contended that the advantages above referred to are out-weighed by the defects inherent in State control. The State, they say, cannot and does not make money go as far or produce as much as an individual, firm or company. When the Government takes to ship-building, it does not turn out as good

ships as private builders. It spends more money over its work, and is a longer time about it. It is not as judicious a purchaser of raw material. It does not get as good a day's work out of its employees. Government buildings, they say, are unduly tedious and costly undertakings; and, in short, having regard to existing results which appeal to the mind of the average observer, railroads are not satisfactory matter for State management.

Whichever of these views be the more reasonable, it is plain that the immense capital invested in railroads greatly complicates the problem. The money that has been expended in them is locked up in a specially permanent sense.\* It cannot, like many other forms of capital, be withdrawn and shifted at pleasure to more productive or promising enterprises. What has been laid out in tunnelling hills, bridging rivers, and making rough places smooth is virtually an irrevocable outlay. If railroads are to be acquired by the Government, somebody must provide the purchase money. On the one hand, the taxpayer's money cannot be extravagantly dispensed, without a violation of duty on the part of the Government. On the other, the proprietor's rights cannot be confiscated or prejudiced, without conflict with the Federal Constitution. Nor is a basis of compensation equitable to all interests concerned such a very simple matter. A basis of original cost is of course out of the question. In respect of an economically constructed and successful railroad, it would be unfair to the proprietor. In the case of an extravagantly constructed and unsuccessful railroad, it would be resisted by the tax-payer. The capitalized value of a going concern is a calculation of some complexity. America certainly would not pay for the acquisition of its

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\* "Railroad Transportation," Hadley, pp. 40, 41.

railroads on the scale adopted by the English Government when it assumed the telegraphs.

The division of power vested in the Federal Government and the several States might, in readily conceivable cases, give rise to much difficulty. Public opinion is not sufficiently unanimous on the subject—even from an economical point of view—to afford any reasonable expectation that so vast a change will be carried through within the immediate range of the investor's vision.

There remains the political aspect of the question, on which the public mind is even more distinctly divided than on its economical aspect. It is quite true that in many European countries State control has answered the purposes of its projectors with a reasonable degree of success. But in those cases it has been more or less congenial to the idiosyncrasies, habits and political bias of the people. As has been ably pointed out in recent treatises on the subject,\* bureaucracy is not uncongenial to the French people. But it may be doubted whether, on the whole, republican government in France of the type recently developed could do better for the general interests of the people than the existing railroad companies. In Prussia, under the strong hand of Prince Bismarck, the assertion of State control must be regarded, not strictly as an economical experiment, but as part of a political machinery tending, in his judgment, toward the consolidation of national unity and the permanent development of military efficiency. (In Belgium, until recently, the Government was itself a large proprietor, and took a hand in active railroad competition. (In England, if the experiment be tried at all, it will

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\* "Railroads, their Origin and Problems," C. F. Adams, Jr. "Railroads and the Republic," J. F. Hudson.



probably be adopted as part of the programme of State socialism; not necessarily because it is economically advantageous, but because it may be thought expedient to adopt this course as the price of party support. In America none of these special conditions are found to exist in any very cogent or convincing form. The control of railroads would subserve no theory of national consolidation or military organization, for the excellent and satisfactory reason that the Country can dispense with such cumbrous drawbacks to the progress of her internal prosperity.

The liability of the rate-payer to meet in the last resort any deficit that may arise from defective government administration appreciably limits the desire of the public for government intervention in private enterprise in all civilized countries. As time goes on, the "machine" becomes more distasteful, and bureaucracy is altogether too intrusive and paternal to commend itself to the instincts of the American people. The average American citizen who has entered himself in the race for wealth is self-reliant in originating enterprises, and strenuous in conducting them. He is apt to resent any interference with the conduct of his chosen business which is not justified by proprietary interest therein. In short, he would like the Government which he elects for his own benefit to confine itself within reasonable limits to the restraint of transgressions against law and trespasses on social rights, and to leave the enterprising citizen to fight out his own battle with the laws of supply and demand. He is conscious that to invest his Government with a new and untried sphere of action, in which political influences may be brought to bear on private concerns, is to say the least of it a dangerous experiment. He has already suffered a

wide and disastrous experience in connection with political jobbery, and on the whole would rather not offer new temptations to the energy, shrewdness and capacity for intrigue which are incident to politics when considered as a profession.

Although therefore many competent thinkers desire the assumption of railroads by the Government, it is, in the writer's opinion, improbable that such a result will be accomplished here, so long as internal peace and the quiet growth of national prosperity are comparatively free from the violent disturbances incident to socialist feeling. It has been noted above that, while this pestilent and unfortunate impulse is certain to make itself felt here as elsewhere, America's powers of resistance are at least as great as those of any other civilized country. If it be true that the "Granger" States represent the dynamite element in connection with American prosperity, it is impossible to forecast with accuracy what embarrassments the action of a dissatisfied and disappointed section of a community may eventually inflict on the law-abiding creators of American wealth and prosperity. But the signs of the times point to the conclusion that the better instincts of the whole people are pledged to the maintenance of the American Constitution.

Let us suppose then that a great deal of foreign money is hereafter invested in American railroads. The chances would seem to be that no assumption of them by the Government will take place within the horizon visible to the average investor of to-day; and that, if such a result should take place, his rights will be respected and compensated as fairly here as in the older European countries. —The outcry of the people against railroads, which have greatly contributed to their welfare, will always be a use-

ful instrument in the hands of the demagogue; but it lacks the salient feature of natural and easily recognizable equity. Nobody denies that, if it had been possible to lay out the railroads of any highly populous and civilized country on comprehensive principles involving central unity and organic symmetry, friction and waste of power might have been indefinitely reduced. But, as no government could have stability or foresight, nor any generation of men material resources, sufficient to justify so gigantic an undertaking, it was left to private enterprise to accomplish the task by piecemeal methods, as best it could.

Having regard to the profit which, since the creation of railroads on a large scale, has rewarded ordinary risks in commerce, trade and manufacture, will any thoughtful observer seriously contend that an average interest of some  $4\frac{1}{2}\%$  on invested capital is an excessive compensation for the *extraordinary* risks incurred in the construction of railroads? *Extraordinary* risks, accepted for a very *ordinary* compensation and enuring in a most remarkable degree to the public welfare, give rise to equities which, as between railroad companies and the Government of any country, are entitled to most careful consideration, and in the long run are likely to receive it.

## CHAPTER XVII.

### GEOGRAPHICAL DIRECTION OF RAILROADS.

AMONG other elementary enquiries, our visitor may probably ask whether the geographical direction of railroads has, from the investor's point of view, any bearing on their present and prospective success; and if so to what extent and for what reason. Any attempt to answer such a question exhaustively would of course exceed the scope and limits of the present notes. Nor has our enquirer any intention of burthening his own note-book with cumbrous tables of statistics. To state in detail the figures which indicate the progress of railroad enterprise in America would virtually amount to a record of the progress of her internal trade. Railroad history, in short, affords something like a rough standard of internal business,—recording in general outline permanent growth, temporary depressions, and temporary recoveries. For any exhaustive discussion of this subject the enquirer will properly refer to recognized text-books. For the present, the practical question is this: Can he derive any useful suggestions from a rapid and superficial survey? Possibly one or two leading conditions connected with the situation may be worth noting.

The tonnage which is annually moved from the Western States to the Eastern seaboard is enormous in its dimensions. But the periods during which the movement of this tonnage continues are unequal in duration and some-



what uncertain in their incidents. Take, for example, a very favourable stage in the commercial history of the great East-and-West roads. Let us suppose that a plentiful harvest has been gathered in by those American States which produce grain and meat in extraordinary profusion. Let us suppose further that there is an immense demand in Europe for imported food. It follows that the period which covers the moving of the crops from Western farms to the Eastern seaboard will tax to their utmost capacity the resources of railroads running due east and west. To accomplish this service with effect, a vast aggregate of rolling stock is an absolute necessity. No railroad which is not in a position to fill large orders for transportation can reasonably expect to hold its own in a keen (and occasionally unscrupulous) competition.

In order to comply with this condition, it is necessary to maintain an amount of rolling stock roughly adequate to the demands of maximum pressure, and therefore greatly in excess of the demand which will exist during the relatively inactive months of the year. If the transporting company is the absolute owner of its rolling stock, it must take account of interest on capital invested therein; also of the cost of repairs and maintenance which are appreciable items of expenditure. If the company hires its rolling stock, it must reckon with the amount paid for car hire; and this too involves serious outlay. To very long hauls during periods of high pressure delay and detention are inevitably incident; and detention in a state of inactivity means suspension of earning power in respect of the cars so detained. Then again the gradual building up of manufacturing industries in the large cities of the Middle and Western States enables those cities to supply a liberal share of the necessaries of life, which were for-

merly transported to the far West from cities in the neighbourhood of the Eastern seaboard. It results that the car which makes a long haul from the far West to the Eastern seaboard is not only liable to considerable delay and detention, but is very apt (if the familiar bull be permitted) to "load back empty."

Under these conditions it is worth while to consider roughly what are the annual net earnings of a vast aggregate of rolling stock. Granting that each car earns a good deal of money during the moving of the harvest, what is its average earning on the work of the whole year? The result is perhaps scarcely as satisfactory as might at first sight be anticipated. So vast is the annual tonnage moved from the West to the East, that—in spite of the immense supply of transportation and extraordinarily low rates—there is amply sufficient to make a fair profit for a certain proportion of competing lines. Those which are intrinsically the strongest and best managed will no doubt continue their career of success. But, to enable them to accomplish this result, the weaker East-and-West lines will probably sooner or later suffer a severe discipline. If there is barely enough to go round and the stronger take the lion's share, the prospect of the weaker must always be a matter for careful consideration,—possibly even of apprehension,—from the investor's point of view. There are indeed optimists who hold that the traffic between the remote East and West will shortly grow up to the existing supply of transportation; and, even at very low rates, make every East-and-West road a paying concern. In this view the writer does not concur. It seems not improbable that, with very modest rates, the business of the East-and-West lines would suffice to pay a fairly liberal rate of interest on all the capital *really and economically*

invested in them. But, when the amount of water which has been infused into existing capital accounts is taken into consideration, it may be doubted whether in the future very remunerative interest will be permanently paid on anything like the whole of their present capital, real and fictitious. The amount of this water is, in fact, so great that the prudent investor can scarcely fail to regard it with misgiving. Suppose to-morrow a new East-and-West "bee-line" were projected and laid out with genuine insight and superior judgment; that it were built without a dollar of waste; and that all the economical advantages derivable from the maximum purchasing power of ready money were utilized. Suppose further that the aid of all modern appliances conducive to cheap and effective construction were conscientiously and scientifically enlisted in the development of the enterprise. Suppose that townships and hamlets throughout the proposed line subscribed with fair liberality in aid of the undertaking; and lastly that the new railroad when built was *operated from the start* on a strictly commercial basis; that its administration had *from the outset* no speculative complications, no expensive emergencies to tide over and no axes to grind, outside of the immediate interest of the road and its stockholders. Such a line, unembarrassed by water and unencumbered by artificial and unnecessary engagements, would break the heart of the weaker East-and-West lines, who would surely, in any future war of rates, find themselves handicapped out of the race. The lightly weighted road would make the most of its light weight, and decline pooling arrangements. A scale of rates, which would provide a fair living profit for a new road constructed and operated in the manner and under the conditions above indicated, would starve the junior

securities of existing weak and heavily watered concerns. Whatever might be the volume of existing business at any given time, the road which could best afford to undersell would have the best of the struggle and be the most likely to survive.

Possibilities of this kind must properly be recognized as factors in the conclusions of an investor, whenever he contemplates acquiring the securities of the weaker East-and-West lines. Whether such a view be well founded or not, it must of course be worth while for the investor to consider the relative claims of lines which run north and south—or diagonally, with some approximation to a north and south direction. Many cities of the Middle States have, in the last twenty years, grown with astonishing rapidity into commercial and manufacturing importance. In exchange for raw material shipped to them from the Southern States, they are in a position to send back a large portion of the necessities of life which the Southern States do not to-day produce for themselves in reasonable proportion to their capacity and general physical advantages. While it may be hoped, in the interest of the latter, that greater attention will hereafter be given to the production of food, live stock, and the manufacture of articles of commerce, it is plain to the observer that to-day the attention of the South is too exclusively concentrated on certain special resources. Some of these—such as coal, iron and other minerals—the soil produces in profusion and in singularly convenient juxtaposition; and others—such as cotton, fruit, etc.—the climate fosters with something like trustworthy assurance of success. The home of the cotton plant is in many instances liberally supplied with the water power to drive the spindle. Coal, iron, limestone and water are found



lying close together within short distances of adequate railroad transportation. The great cities of the Middle States afford a convenient market for the Southern producer of these raw materials. Chicago, Cincinnati, Louisville, St. Louis, and many other inland cities desire new markets for their finished goods, and invite interchange by all available means.

What is likely to be the effect of these conditions on railroads from the investor's point of view? First and foremost, "way trade" is far more remunerative than "through business." Cars, which carry coal to a furnace or cotton to a mill, carry also the manufactured product to a convenient market, and bring back the stores necessary for the requirements of the manufacturing community. There is in short ample material for *interchange*; and transporting companies load their cars to some extent in both directions at rates higher than "through business" between very distant points will stand. Again, the trade between the North and South is in its infancy,—while a good deal of the East-and-West trade has, so far as the profits of railroad companies are immediately concerned, passed into a period of comparative decrepitude. The future of rates on North-and-South lines seems less liable to disturbance from the incidents of severe competition than those of due East-and-West lines. Water transportation, which limits to a great extent the elasticity of East-and-West rates, operates with far less severity on the strictly inland lines which exchange the raw produce of the South for supplies furnished by the great cities of the Middle States. While the importation of food to Europe is likely to afford for some years to come a fairly profitable business, its conditions are not very stable, nor its remuneration excessive. Railroad enterprises which

depend on this condition to any great extent are liable to serious disappointment.

So far the coloured labour of the South, as compared with the white labour of the "Granger" States on the great East-and-West routes, has been less demoralized by popular agitation; and perhaps on the whole the disturbance of business by prolonged and serious strikes is less probable in the future. In the South the deference paid by the labouring classes to the seditious suggestions of the professional demagogue is less general and less earnest than in the "Granger" States. The writer remembers the time when the "carpet-bagging" demagogue who went South from the Eastern States could command a ready ovation by the utterance of a florid and preposterous stump speech. On the eve of an election he was wont to say to a lazy and thriftless coloured audience that the North "looked to them to inform politics with patriotism, law-courts with equity, and society with refinement"; and he would be greeted by a hearty salvo of cheers. Let him make the same effort to-day, and he will find the result deeply disappointing. When he reaches the climax of unblushing flattery, a good-humoured "darkey" in the crowd will simply nudge his neighbour and say "he guesses the boss must be going to send round the hat." In short, even in the South, the national humour is to some extent awakened. It is beginning to be dimly understood that nobody ever lavishes fulsome praise on the lowest of the people, except when he wants to use them for his own purposes. The perception of this fact overthrew Mr. Tweed's celebrated Ring. Many patriotic orators had urged with eloquence and ability the rights of the people. But their appeals fell somewhat flat. Mr. Tweed and his friends

replied, in effect, that they did not care much about the "People" [whatever that phrase might mean], so long as they had behind them a compact and highly organized majority of irresponsible persons. But presently somebody approached the subject from a different point of view. Perceiving the absurdity of the situation, he asked: "*Who* are these people that impose on us unlimited taxes, expend them for their own aggrandizement, and rule us with a rod of iron? Are they (as Mr. Gilbert's *Duke* in "*Patience*" candidly enquires) particularly intelligent, or remarkably studious, or excruciatingly witty, or unusually accomplished, or exceptionally virtuous?" The next enquirer asked: "Do they contribute much to the taxes which they impose? Are they particularly distinguished as legislators, or specially eminent in their scientific or professional careers?" The answer returned was in the negative. It was rendered, not with a howl of moral indignation, but with a subdued sense of amusement, that citizens of responsibility and common-sense had allowed themselves to be so absurdly out-generalled and "got so badly left." Underlying however this subdued sense of amusement was a strenuous resolve not to "get left" a second time, and the downfall of the Ring became a fore-gone conclusion. It remained for Mr. Nast's pencil to accelerate its funeral.

The gradual awakening of national humour is the knell of the demagogue's trade. It is a very hopeful sign, from the point of view of the investor in Southern securities, that the demagogue cannot accomplish as much in the South to-day as he could some ten or fifteen years ago; nor even as much as he can to-day accomplish among the inhabitants of the "Granger" States, who are made of sterner stuff than the labourers of the South.

Again, with one or two exceptions, Railroad Commissions in the South have been less ambitious, and have, on the whole, exercised their powers with greater judgment and moderation than elsewhere. The Massachusetts Railroad Commission may be regarded as standing apart by itself, and as outside the scope of the present consideration. This is probably due to the exceptional personal ability of its representatives, as well as to the wise limitation of the powers granted them.

Moreover, there would seem to exist in the South a somewhat higher and more general appreciation of the great benefits conferred by railroads on States recovering from depression than is to be found in the Granger States; and consequently railroad corporations are dealt with in a fairer spirit. Granting that to-day the aggregate mileage of railroads in the South is somewhat in excess of the demand of the aggregate tonnage to be moved and travel to be accommodated, still there is a larger margin of undeveloped internal resources than in the Northern and Middle States. In short, the trade of the former is on the whole growing up to a remunerative point (so far as concerns railroads) at a more rapid rate of progression than the trade of the latter. Amongst other indications of prosperity, the mineral trade of the South shows a steady and encouraging advance.

To suppose that, because a given district discloses at any given time unusual wealth in mineral products, the whole active world of capital and energy will immediately migrate to that spot is of course visionary and absurd in the last degree. But it is probably true that, in the long run and after allowing a sufficient interval of time for transfer of capital and adjustment of the market, the sphere of cheap production will become to a greater or less extent the



home of a successful cognate industry. Time is needed to bridge over a number of gaps in the process of transition; but sooner or later the laws of supply and demand, operating under the stress of keen competition, cause the producer to gravitate towards the centres of cheapest production.

To take a familiar instance: If it should hereafter be found that marketable pig-iron can be manufactured and marketable coal supplied in Alabama at a substantially lower price than in Northern States, it will pay the manufacturer of the Northern and Middle States to work up Southern iron, rather than to raise the raw material for himself. What is good for the trade of a State tends to the prosperity of its railroads. If, as some observers think, the rapidly growing city of Birmingham, Alabama, should hereafter become a centre of a "black country," like its namesake in England, a great impulse will have been given to the energy and scope of Southern industry; and the importation of foreign capital and skilled labour will be ensured. The marketable products of the country will obtain a larger circulation, and progress in many industrial departments will follow the indications of success. Some assurance will be offered to capital that it is invested in rising not in sinking communities and near the cheapest known centres of production.

Though the coloured man has in many respects disappointed the lofty estimate formed of his capacity for the higher range of administrative functions, he is not on the whole a bad citizen or labourer, if properly directed. His sense of humour is not a myth. On the contrary, though in a rudimentary stage, it saves him from many extravagances, and supplies wholesome restrictions on his credulity when under treatment by the professional demagogue.

Persons thoroughly familiar with his habits of thought are not over-much surprised at his practical common-sense in many departments of life. Tell him for instance that, according to the modern "high-toned" view, you must seek political wisdom, not from educated and disciplined thought, but from the fresh impressions of the most ignorant people you can find. He replies: "If the poor white trash up in the piney woods know more than the bosses at Washington who are studying all the time, he guesses that it is not much good to starve himself to send the boys to school." It would no doubt be easy for a competent debater to demonstrate on the spot that fresh impressions, being free from the restraints imposed by knowledge of facts are more trustworthy guides to the wise solution of difficult problems than the conclusions of educated reasoning. An eminent wit of old is reputed to have shrunk from reading a book before reviewing it, "because it prejudiced a fellow so." In short, the real difficulty of handling a subject would seem to arise from the limitations imposed by knowledge rather than from those imposed by ignorance. This view is somewhat disappointing to old-fashioned people who had supposed that, by disbursing the tax-payer's money for compulsory education, they were converting capricious political aptitudes into permanent and valuable habits, and eventually promoting the cause of sound government.

Though the coloured labourer of the South is very apt to be both lazy and thriftless, the gradual acquisition of a little property has tended to steady and develope him. He is physically strong, remarkably enduring under the strain of a semi-tropical climate, very light-hearted, and almost entirely free from apprehensions concerning the future. His wants are extremely few and simple, and

he is willing to labour for a rate of compensation which his white brethren in the East or Far West would decline or resent. If, on the whole, he is a less competent labourer than the better class of white men, it is by no means clear that his labour is not better worth having at the price for which it can be obtained. The rate of wages which he demands is appreciably lower, and in the case of the farm labourer a good deal of it is paid in kind. On the whole, it is reassuring to persons interested in Southern undertakings to note that, if their enterprises are in other respects sound and well conceived, their success will not be imperilled by the mere colour of the labour which they employ. From the point of view of the investor of new capital, a reasonable prospect of *progressive* increase in the value of his securities is a consideration of the first importance.

## CHAPTER XVIII.

### SOME IMPORTANT DECISIONS.

WITHOUT going so far as to say that the American Constitution is the investor's Bible, it would seem that a few salient provisions contained in it are of such importance as to deserve some consideration on the part of an enquirer interested in American railroad securities. Where any note has been appended to cited cases, it is not the purpose of the writer to attempt an analysis or summary of a case, but merely to direct the investor's attention to some one point which may seem to bear directly on a specific phase of his interest. For the purposes of convenient reference, short extracts are set forth.

1. Constitution of the United States, Art. I., Sec. 10.—No State shall . . . make any *ex post facto* law, or law impairing the obligation of contracts.

2. *Id.*, Art. V.—No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### JURISDICTION.

3. *Id.*, Art. III., Sec. 2.—The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to



all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States ; between a State and citizens of another State ; between citizens of different States ; between citizens of the same State claiming lands under grants of different States ; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

4. *Id.*, Art. XI. [amendment].—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

5. Art. XIV., Sec. 4.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave ; but all such debts, obligations, and claims shall be held illegal and void.

#### REMOVAL.

6. Sec. 639, R. S. U. S.—Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial, into the circuit court, for the district where such suit is pending, next to be held after the filing of the petition for such removal

hereinafter mentioned, in the cases and in the manner stated in this section.

First.—When the suit is against an alien, or is by a citizen of the State wherein it is brought, and against a citizen of another State, it may be removed on the petition of such defendant, filed in said State court at the time of entering his appearance in said State court.

Second.—When the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same, and a citizen of another State, it may be so removed, as against said alien or citizen of another State, upon the petition of such defendant filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the State court as against the other defendants.

Third.—When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files, in said State court, an affidavit, stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such State court.

*Ayres v. Watson*, 113 U. S. Rep.; *Gregory, v. Hartly*, 113 U. S. Rep.

*Stone v. South Carolina*, 117 U. S. Rep., 430. A State

court is not bound to surrender its jurisdiction of a suit on petition for removal, until a case has been made which, on its face, shows that the petitioner has a right to the transfer; and if it decides against the removal and proceeds with the cause, its ruling is reviewable by the ultimate court of appeal after final judgment.

Of course, the foreign investor is interested to a greater or less extent in a vast range of statute and case law. But the utmost that is possible within the scope of the present notes is to briefly direct or recall his attention to certain very limited aspects of his interest—present and future—in connection with which it may be specially sensitive to hostile action on the one hand, or admit of effectual defence on the other. At once the most familiar and formidable complications would seem to arise from the conflict between Federal and State powers—*e. g.*, cases in which a State desires to impair the obligation of contracts, or to injuriously affect property, by the enactment of laws of doubtful validity within the meaning of the Federal Constitution. A few notes and references roughly indicative of familiar situations are subjoined.

#### IMPAIRMENT OF CONTRACTS.

7. *Dartmouth College v. Woodward*, 4 Wheat., 498. The charters of private corporations are contracts protected from invasion by the Constitution of the United States. “The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration, for the grant.”

8. *The Binghamton Bridge*, 3 Wal., 74.—“The Legisla-

ture, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

9. *Fletcher v. Peck*, 6 Cr., 87.—A *contract* is a *compact* between two or more parties. The Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a State and individuals.

10. *Green v. Biddle*, 8 Wheat., 105.—The practice of the courts of the United States—that is, the remedies of the parties therein, is subject to no other power than that of Congress.

11. *Wolf v. New Orleans*, 103 U. S., 358–365. "Legislation producing this latter result (impairment of the obligation of a contract by abrogating or lessening the means of its enforcement), not indirectly as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded, treated as if never enacted, by all courts recognizing the Constitution as the paramount law of the land."

12. *Id.*, 367.—"The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contract of the State and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired in the sense of the Constitution when the means



by which a contract at the time of its execution could be enforced—that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating upon those means.”

13. *The Bridge Proprietors v. the Hoboken Co.*, 1 Wal., 116.—Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is “drawn in question,” and the decision is in “favour” of its validity, within the meaning of the 25th section of the Judiciary Act of 1789. This court may accordingly, under the said section, re-examine and reverse the judgment or decree of the State court given as before said. The case distinguished from the *Commercial Bank v. Buckingham’s Executors* [5 Howard, 317], Grier, J., dissenting.

14. *Id.*, 2.—A party relying on this court for re-examination and reversal of the decree or judgment of the highest State court, under the 25th section of the Judiciary Act of 1789, need not set forth specially the clause of the Constitution of the United States on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution, it is enough.

15. *Osborn v. Bank of the United States*, 9 Wheat., 738–903.—An injunction was sustained against the treasurer and auditor of Ohio to prevent the seizure of moneys belonging to the bank in payment of taxes levied under an unconstitutional law of the State. Marshall, Ch. J., delivering the opinion said: “If the person who is the real principal, the person who is the true source of the

mischievous, by whose power and for whose advantage it is done, be himself above the law, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

16. *United States v. Lee*, 106 U. S., 196; cited and affirmed in *Davis v. Gray*, 16 Wal., 203-220.—"Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed against the officers of the State in all respects as if the State were a party to the record." In deciding who are the parties to the suit, the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.

In *Davis v. Gray*, the Governor and the Commissioner of the General Land Office of Texas were "enjoined from issuing, or causing or permitting to issue," patents of certain lands, the sale of which her Constitution had authorized, upon the supposition that the title of a corporation to them had been lost. In considering the right of a private party to maintain suit against those officers, inasmuch as a suit could not be brought directly against the State, the court reasserted the doctrine announced in *Osborn v. Bank of the United States*.

The objection suggested was also considered and disposed of in the *Board of Liquidation v. McComb*, a case against these very officers, decided in 1865. There the board undertook to liquidate a debt contracted in reconstructing and keeping in repair levees on the

Mississippi River, with consolidated bonds issued under the act of 1874, pursuant to the authority of a subsequent statute of the Legislature. A citizen of Delaware holding some of the consolidated bonds contended that the levee debt was not one of the debts to fund which these bonds had been issued, and that the use of them for that purpose would defeat one of the benefits of the funding scheme. He therefore applied to the Circuit Court of the United States for an injunction to restrain the board from funding the levee debt with these bonds, and obtained it. The injunction was made perpetual by a final decree, which was affirmed here. "In our judgment, therefore," we said, speaking by Mr. Justice Bradley, "the court below was right in granting the injunction as to the consolidated bonds, if the defendants, occupying the official position they do, are amenable to such a process. On this branch of the subject, the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself, and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal, may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will



sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."—92 U. S., 531, 541.

For another view, see *La. v. Jumel*, 17 Otto, 711, and dissenting opinion of J. J. Field and Harlan. There may be a *statutable* obligation on a public officer to fulfil a public duty of such a kind as to be enforceable in Federal courts.

17. *U. S. v. Diekelman*, U. S., 520; *N. H. v. La.*; *N. Y. v. La.*, U. S., 77. A State cannot allow the use of its name in a suit against another State for the benefit of one of its citizens, or become a mere collecting agent of his bonds or coupons.

18. The law which governs the police power of States is important, because the elasticity of these powers would seem to be extraordinarily great. If they are so interpreted as merely to sustain the inherent power of States to regulate railroad business within the ordinary meaning of the term "regulation," the investor in the securities of Granger States has no special cause for apprehension. But, if they are so interpreted as to amount, in effect, to indirect confiscation of the increment of value and of vested interests in various other forms, they are plainly calculated to alarm and alienate foreign capital. It may be worthy of note that the mind of the highest tribunal in this country would appear to be not finally made up on this very important subject. While the general tenour of



the Granger cases favours an interpretation of police regulation strongly adverse to the interests of an intending investor, the dissenting opinions of very strong and able Judges tend in the opposite direction, and incline to the protection of contracts under the provisions of the Federal Constitution. The cases cited below will repay the casual investor for the trouble of considering them attentively. *Munn vs. Illinois*, 4 Otto, 113; *C., B., & Q. R. R. vs. Iowa*, 4 Otto, 155; *Peik vs. C. & N. W. R. R.*; *Winona and St. Peters vs. Blake*, 4 Otto, 164.

#### RESERVED POWER OF STATES TO REPEAL OR MODIFY CHARTERS.

19. When a State reserves to itself under the provisions of an old existing constitution the right to repeal or modify at will the charters which it grants,—and by inference the contracts which it makes,—a railroad corporation accepts a charter subject to the risks and losses incident to the future exercise by the State of such reserved power. See *Tilley v. Sav.*, Florida, and *Western R. R. Co.*, 5 Fed. Rep., 641. Woods, C. J., speaks as follows: “It has been the policy of Georgia, at least since January 1st, 1863, to grant no charter which should not be subject to revision or repeal by the General Assembly. Whether wise or unwise, this policy has been embodied in the constitution of 1877. It was clearly the purpose of the people, in the adoption of that revision of the organic law, to keep the charges of the railroad companies of the State within legislative control. They were not satisfied with the rules of the common law on this subject. The act of October 14, 1879, is but the practical expression of the will of the people of the State as embodied in their organic law. It

is the exercise of a right which they have been careful to reserve, and subject to which the defendant company were allowed to exist as a corporation."

The case is important, because it indicates the necessity of strictly investigating the reserved powers of States to repeal charters or modify a contract by *ex post facto* legislation, *after* the valuable consideration of building a railroad has been paid by a corporation. Acquiescence in the consolidation of chartered railroads and in the issue of their securities does not affect the right of a State to exercise reserved power. The investor in railroads must depend on the virtue of the people rather than on enforceable rights of contract, and this is, of course, a matter of taste and judgment.

20. As regards the right of a State to decline to permit itself to be sued, and the point to which and limitations under which this protection is extended to public [State] officers, acting in conformity with their official instructions, see *Hagood v. Southern*, 117 U. S. Rep.; *R. R. Company v. Alabama*, 101 U. S. Rep.; *Poindexter v. Greenhow*, 114 U. S. Rep., and cases connected therewith, known as the Virginia Coupon Cases.

21. In view of the great injury to railway business arising from strikes, and the intimidation and obstruction incident thereto, a case recently decided by the New York Court of Appeals, the highest authority in that State [reported in the *New York Railway Age*, July 8, 1886], may be worth perusal.

The action was that of Meyer Geismer, respondent, *v. Lake Shore & Michigan Southern Railroad Company*, appellant, and was brought by the plaintiff to recover damages caused by delay of many days on account of the great strike at Cleveland and along the line in 1877. The

plaintiff recovered a large verdict at the circuit, which was affirmed at the general term. The Court of Appeals has just reversed these decisions, and holds that a common carrier is not liable for any delays occasioned by a resisting force or mob over which it has no control.

The Court, amongst other things, spoke as follows: "A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune, not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination, and so it has been uniformly decided.

"In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods entrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, or a mob may tear up the tracks, or disable the rolling-stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

"While the Court below conceded this to be the general rule, it did not give the defendant the benefit of it, because it held that the men engaged in the violent and riotous resistance to the defendant were its employees, for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant; but they left and abandoned that employment. They ceased

to be in its service, or in any sense its agents, or for whose conduct it was responsible. They not only refused to obey its orders, or to render it any service, but they wilfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of its employees, who were willing to serve it. They became a mob of vicious law-breakers, to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger-cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered." \*

As the law relating to strikes and the obligations and liabilities devolving on railroad companies in connection therewith can scarcely be considered to be finally settled, this case is reassuring to the investor in railroad securities.

22. Some observations have been made above [90-109] as to the importance from the investor's point of view of the powers conferred on railroad commissions as factors in the general railroad situation of to-day. The enquirer may not unreasonably say that, in order to form any adequate judgment on the subject, it would be convenient to have before him a typical example of an act conferring such powers, together with the remedies, penalties and general provisions included therein. In order to meet this requirement, the Act of Georgia constituting its Railroad Commission is subjoined in the form of an ap-

\* *Railway Age*, July 8, 1886.



pendix. Measured by the average standard of railroad legislation, this may be considered a stringent act.

The law of Massachusetts is considered by many competent critics to occupy the highest place as a precedent or model for railroad legislation in America, and is comparatively well known to foreign investors. A short extract showing powers reserved to the Commonwealth is subjoined.

## CHAPTER XIX.

### SOME NOTES ON THE INTER-STATE COMMERCE ACT.

SINCE the above pages were written, a bill addressed to the regulation of Inter-state commerce has passed into law. That legislation in this direction would be carried through both Houses at no very remote period was confidently anticipated by competent observers of the railroad situation. No serious doubt existed as to the power of Congress to institute an appropriate tribunal for the regulation contemplated by the Constitution. But there existed a conflict of opinion as to the legitimate scope of the powers which could lawfully and wisely be conferred on the Commission of the future. It is too early in the history of the recent Act to predict, with any semblance of confidence, the effect which it will produce on the commerce and trade of the country, because it is necessary to take into account elements which are at present unknown quantities. Forecasts based on the operation of the laws of supply and demand are liable to serious disappointment. This branch of the subject involves many complex and obscure conditions, and is, at the best, very imperfectly understood. As has been noted above, these laws do not readily lend themselves to arbitrary control. Their beneficent operation may easily be retarded by rash legislation, but can very rarely be materially accelerated by heroic measures. Again, the cordiality or dislike, with which the new legislation may be accepted by the railroad

companies on the one hand and by the outside public on the other, are also unknown quantities. Sociology is not sufficiently advanced to enable the observer to measure and define the undercurrents of motive and feeling which may, to an appreciable extent, affect the calculation. Although however elaborate prediction as to net results may be dismissed as futile, the Act contains certain known elements which may be regarded as tending to produce definite effects, and these are the legitimate subjects of criticism. If this be so, it may not be wholly uninteresting to note a few points which occur in connection with the history and tenor of the Act, provided such notes be suggestive—not didactic—in character.

Having regard to the immense complexity of the interests involved, it is difficult to resist the conclusion that the legislation embodied in the recent Act has been somewhat over-hasty. Investigation of the more searching kind has followed, instead of preceding, enactment. The amount of light which experts have thrown upon the bill since its passage became a foregone conclusion has greatly exceeded that which was shed upon it in its earlier stages. To use a metaphor, the patient's disease was complex in character, and its symptoms were obscure and misleading. But his condition was not immediately critical, and his life and health were matters of immense public importance. As his disease was confessedly not understood, would it not have been wiser to prolong the process of diagnosis than to administer a kill-or-cure remedy, and trust to a post-mortem examination for the explanation of the malady? In the writer's opinion, the case called for a special commission, in order that its legal, commercial and social conditions might be adequately investigated, and that the direction and scope of

so vastly far-reaching an enactment might be wisely determined.

As the bill has passed into law, it is obvious that its antecedents are now of little practical importance, from the investor's point of view. To examine in detail the provisions of the Act would greatly exceed the limits of space which can properly be allotted to the present notes. This task has been ably carried out in Mr. Dos Passos' excellent analysis of the Act,\* which greatly facilitates the understanding of a somewhat obscure piece of legislation, and to the author of which the present writer acknowledges his obligations.

The legal difficulties which beset the situation are ably set forth by the author referred to, and that aspect of the question may be considered as practically exhausted. From the foreign investor's point of view, some of these difficulties are of deep and immediate interest, while others, so far as the protection of his money is concerned, may be regarded as "soaring into the region of speculation." The only criticism which would seem to call for his attention has reference to the probability of situations favourable or adverse to his permanent interest being generated by the Act, and either inspiring him with courage or depressing him by apprehension. Even this very limited view of the subject postulates reference to the leading provisions of the Act, to their soundness in principle, and the chances of their beneficent operation. Accepting then Mr. Dos Passos' work as a text-book of authority, it is proposed to jot down the writer's impressions on those particular points to which the foreign investor may do well to devote passing attention. These may be briefly classified

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\* "The Inter-State Commerce Act," by John R. Dos Passos, G. P. Putnam's Sons, New York, 1887.



under the following heads, viz. 1. Definition of regulation of Inter-state commerce and the language of the Act. 2. Some possible commercial results. 3. Some points bearing on the relation of the Act to the existing system of jurisprudence.

1. It seems to the writer that in the framing of the Act no sufficient attention was given to the interpretation of the language of the Constitution; and that notably the true meaning of the word "regulation," within the spirit of the Constitution, scarcely received the consideration which it deserved. In France, under the third Napoleon, no doubt "regulation" was practically taken to mean dry-nursing by the State, and an intrusive supervision of a very large area of private interest and personal business. As has been noted above, it is of course a question of national bias and idiosyncrasy whether paternal superintendence is or is not congenial to a people; and the proper meaning of "regulation" is to some extent coloured—if not actually extended or restricted—by this consideration. But among the English-speaking races intrusive and inquisitorial government supervision is habitually resented. "Regulation," as understood and submitted to by the English and American peoples, gives prominence to reasonable restrictions, but rarely prescribes positive rules of action. The negative side of the term is dominant; the positive side is subordinate. Police regulation aims at the restraint of aggression, the prevention of trespasses and nuisances, and the redress of established grievances. But it seldom takes under its control the constructive side of commercial or industrial enterprise. If the language of the American Constitution be carefully considered, it is difficult to resist the conclusion that the "regulation" of Inter-state commerce was in-

tended simply to restrain any selfish or obstructive policy which might prevent or hamper transportation through the various States, and to redress injury to the trader or consumer which might directly arise therefrom. In the writer's opinion, there is nothing in the language to justify the notion that regulation of Inter-state commerce was intended to involve the assumption by the Government of the functions of railroad managers. To restrain unnecessary embarrassment to commerce in its passage through appropriate channels is one thing ; to run the railroads of the country is emphatically another.

If this view be sound, the relation of the new Act to the Constitution would seem to be not entirely satisfactory. In this connection one or two points may properly be indicated.

(a) As everybody knows, the powers enjoyed by Congress are, in fact, the aggregate of several powers carved out of the sovereignty claimed by the several States, and surrendered to Congress for the purpose of promoting national unity and good government. But these powers are contained within the four corners of the written Constitution, and it would scarcely be safe to rely on any supposed surrender to Congress by the several States of large inferential powers not explicitly defined in the text. Authority to prevent by appropriate legislation obstructions to the development of commerce was plainly granted. But where is it shown that the several States surrendered to Congress the right to run the business of railroad corporations within the limits of their respective sovereignties?

As indicated above (pp. 97-100), the more fortunate States succeeded in inducing native and foreign capitalists to make large outlay in the construction of railroads, and

by this means to develop the latent resources of the States in which their railroads were situate. The extraordinary risks which constructing companies undertook, and the vast amount of capital which they locked up, were distinctly protected by charters which expressed the deliberate will and purpose of the people of those States, and formed an integral part of their statute law. It was believed at the date of such charters that the several States possessed contracting power, and that parties contracting with them could not be divested of their rights under the Federal Constitution merely because the States had surrendered to Congress the power of "regulating" Inter-state commerce. If this view was ever sound, it must be sound to-day. It will hardly be questioned that as a net result the new Act purports to vest in the Commission the practical control of the operation of American railroads. Whether particular Commissioners may be disposed to push their power to its utmost limits or to exercise it with great moderation, will depend on the constitution and discretion of the Commission for the time being.

(*b*) It has been noted above that the delegation of prerogative power is liable to serious objection. No doubt Congress can properly delegate to officials strictly ministerial business. But one of the distinctions between ministerial and legislative business turns on the discretion to determine questions affecting the public good. A doubt has been expressed above (pp. 107-108) whether a State can delegate to a fiscal agent the right to virtually modify a charter for the public good and not as a penal measure, such modification being (in the writer's view) a legislative and not a ministerial act. By analogy the same line of reasoning may be applied to the action of Congress when it vests in Commissioners powers which involve the mak-

ing or unmaking of rights of property distinctly protected by the Federal Constitution. May it not be reasonably contended that the authority delegated to Congress by the several States was so delegated, because in the opinion of the several States Congress was a proper and representative trustee? But, if it had been supposed that Congress could sub-delegate these powers (outside of merely ministerial matters) to agents or nominees about whom the States had no specific knowledge, an entirely new set of precautionary measures would have been instituted by the States in their own protection. It might well have happened that neither the States themselves, nor parties contracting with them on the faith of their sovereignty and its relation to the Federal Constitution, would have objected to any direct exercise of power by Congress *itself*, authorized by the Constitution, because they considered that Congress itself could be trusted to exercise a safe and enlightened discretion. But it often happens that individuals or bodies of men are willing to delegate to a trustee, in whose judgment they have great confidence, a wide discretionary power affecting vast personal and financial interests, but would unconditionally refuse to such trustee the power of sub-delegation to a nominee chosen exclusively by himself. Suppose a State, in granting a charter for valuable consideration, had enacted a maximum rate for freight or passengers, and that the elasticity accruing to the managers from this maximum constituted the leading condition of the prosperity of the railroad in question. Is it competent to Congress, under the pretence of "regulating" Inter-state commerce, and within the reasonable interpretation of the term, to legislate away from the corporation—which has built a railroad and so paid value received—the benefit of that



statutory limit? Again, if the business of a railroad can be run in conformity with a charter granted by a State in which it is situated, with absolute freedom from penalties, is it competent to Congress to create, *ex post facto*, a liberal schedule of new offences involving severe penalties, in virtue of the very limited power surrendered to it by the State for the purpose of "regulating" Inter-state commerce? Can it thus handicap out of the competitive race a railroad which has a right to look to the sovereign State for its protection? Even if it be competent to Congress to create such new offences and punish them by penalties as a *legislative* act, is it competent to that body to delegate the discretionary power of imposing, enforcing, modifying or waiving such penalties, as if these acts were matters of *ministerial detail*,\* instead of constituting a grave interference with the rights of citizens? Are not these acts so grave as to need deliberate legislative sanction, and to call for fair consideration by debate and discussion under constitutional forms? May it not be true that a contract, under which one can do business peacefully, legitimately and in accordance with the sense of the community in which one lives, is "impaired"† within the spirit of the Federal Constitution if *ex post facto* prohibitory penalties are imposed on it? Has not a State some reason for examining closely the true nature of the powers which it surrendered to Congress, and to contend that it carved out of its sovereignty a right to prevent abuses and redress grievances within the meaning of the "regulation" of Inter-state commerce, but certainly did not give Congress the right to usurp the control and supervision of enterprises fostered in its own interest and protected by its own sovereignty?

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\* *Supra*, pp. 107-109.

† *Supra*, p. 106.

(c) The obscurity of the language of the fourth section has been liberally discussed by the public Press, and the subject may be considered threshed out. It is enough for the present purpose to say that the language of any statute should, at the outset, be sufficiently clear to the average understanding of competent readers to dispense with the necessity of interpretation by the courts, before comprehensive and uniform action can be confidently taken in obedience to its provisions. What may be the true meaning of the "regulation of Inter-state commerce"; what are its incidents in connection with State sovereignty and Federal authority; and what interpretation will be placed on the language of the fourth section, must abide the decision of the Supreme Court of the United States.

2. It has been noted above that, by reason of imperfect knowledge, it would be unprofitable from the investor's point of view to make any elaborate forecast concerning the effect of the Act on the trade and commerce of the country. A brief notice, however, of one or two leading features in the situation may be in order. The better opinion prevailing amongst a large number of educated people inclines to the view that the bill indicated by the special conditions of the case was a bill defining clearly and equitably discrimination and extortion, and restraining those offences by appropriate mechanism, but excluding from its scope imperfectly reasoned conclusions from data inadequately investigated. Such a bill, cleanly-cut and dealing exclusively with well-understood points, would have commanded universal sympathy and approval. Granting that it did not exhaust the subject, it would have constituted a valuable instalment, and would have cleared the way for further beneficial legislation when the

questions to be subsequently dealt with had been exhaustively considered. For legislation repressing distinct offences there existed abundant precedents. But for the comprehensive treatment of the "long- and short-haul" doctrine there existed no precedent, and very little exact knowledge. When this clause and the question of pools were included in the bill, the lack of adequate information on the subject became apparent.

(a) An angry and disappointed crowd of shippers clamoured for immediate and drastic remedies for their own particular grievances. Their cry was, in effect, "Cut the combs of the railroad corporations at all hazards." It was plain that emotion and prejudice overrode the suggestions of enlightened self-interest. Producers, who had located their enterprises too far from their market, instructed their representatives to vote for a measure, of which the first and most immediate effect could only be to raise through rates and impair the marketable value of their produce. Rather than leave the railroad corporations alone, the producer was willing to "cut off his nose to spite his face," and gave his representative a mandate to vote for the bill. How the producer of corn in a remote Territory, or of iron or coal in the Southern States, could see his account in promoting an increased rate for through transportation passes the understanding of the average observer. Why (*e.g.*) should the Californian producer of wool, sugar, or grapes desire such a bill? Time and reflection will no doubt bring repentance;—but then repentance (as we all know from experience) does not always afford an escape from the penalties incident to indiscretion. Already—almost immediately on the bill coming into operation—the Southern Steamship Association is arguing before the Commission that the Act will be injurious to the

prosperity of the South. This circumstance supplies a suggestive comment on the validity of the reasoning adduced in support of the beneficial tendency of the bill, from the point of view of producers located at a great distance from their market.

(b) Much stress has been laid on the provision under which the Commissioners can suspend the operation of the "long- and short-haul" clause, on good cause for such action being shown. The signs of the times point to the probability that a vast number of corporations will apply for the exercise of this suspension in their own self-defence. A rule coupled with an exception can scarcely be worth enacting, if the cases to which the exception applies are more numerous than those covered by the rule. The familiar relation between rule and exception becomes inverted. A vast amount of trouble, expense and general friction is imposed on the applicants for the benefit of the exception. To subject the countless and complex details of railroad administration to the direct supervision of Government officials is the apotheosis of red tape. Against the claim of disappointed shippers, to the effect that comprehensive legislation dealing with the "long- and short-haul" clause and with pools should be immediately passed in the absence of adequate investigation, several obvious considerations may be urged. There is the equity of the general consumer. Rates for freight and passengers on American railroads compare favourably with those of any other important country, if the matter be looked at all round, and the relative merit of the service be taken into account. Experts have made a strong case in support of the proposition, that the general public would be better served by the modes of railroad administration existing prior to the passage of the Act, than by those which are



now subjected to governmental supervision.\* In democratic communities, the maximum welfare of the general consumer is a consideration which can not be lightly pooh-poohed. Again, there is the equity of the railroad companies. As has been noted above, the Federal Government could not, and did not, build the railroads which have contributed so largely to national wealth and progress. They were, perforce, built piece-meal by private courage and enterprise, and in many cases aided by the resources and protected by the sovereignty of the several States. On the whole, they have served the public well; and the existing low standard of rates, and the high average merit of the service offered to the public, establish this proposition beyond the possibility of question. As between themselves and the public, they possess large natural equities and cogent statutory rights.

(c) The disappointed shipper is often the victim of a fallacy which (for lack of a better term) may be called the fallacy of the illusory standard. This apparently fanciful expression needs explanation. The producer who located his enterprise at a point remote from reasonable accessibility to transportation did so with his eyes open and at his own risk. The Government did not compel him to do so; no railroad invited or advised him to do so. Yet when he compares his position with that of his schoolmate or friend, who has settled in a locality highly favoured in point of transportation and is making a fortune rapidly, he often estimates his rights by a false standard. His friend's farm is close to a competitive point on a cheaply constructed railroad. His own farm is (say) fifteen miles from a very expensive branch rail-

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\* "Railroad Transportation," by Arthur T. Hadley; "Railroad Practice," by E. Porter Alexander,

road, which had rivers to bridge and mountains to tunnel, and which by so doing became necessarily liable to heavy fixed charges. How can the foolish shipper expect as favourable a rate as his wiser friend or competitor? The rate which he has a right to expect must be compared, not merely with the very low rate charged to his friend by a cheaply constructed line for competitive business, but with a way-rate sufficient to give a living profit to a costly line constructed through a difficult country. A rate on way-business, on the faith of which that expensive line was constructed through a difficult country, is no doubt relatively high, but may be entirely reasonable. It affords to the badly placed shipper a far better chance than he would have possessed if the line had never been built. If he settled in a badly selected locality *after* the line was built, he accepted the position subject to the equities attaching thereto. If the line was built after the date of his settlement, it could of course only be built on the faith of remunerative rates. And so it comes to pass that, when he asks the railroads or the general public to indemnify him for his unfortunate selection of a location, he sets up an illusory standard of relative right. To cite a familiar illustration, it was no doubt somewhat rough on the five foolish virgins in the parable that, at a critical moment, they found their lamps going out; but their right, as against the wise virgins, was confined to the right of entreaty. If they supposed that they were entitled to a general division of the oil which remained, they were the victims of "an illusory standard" of right.

Of course cases occur in which conflicting equities require the deepest kind of insight for their true solution. Much deliberation is needed to marshal the equities of such cases in their proper order. Take, for instance, the

case of the English farmer, who finds that imported produce—which has gone far to break his fortunes and his heart—passes over English lines at a very low rate, while his own produce pays a relatively high one. It is (as mentioned above) impossible to pooh-pooh the interest of the general consumer. Importation of food at cheap rates is a condition vital to the welfare of the masses, though it rings the knell of the English farmer's prosperity. Yet it can scarcely be denied that he, as well as the masses, has some genuine equities of his own. He was badly knocked about by the repeal of the Corn laws, and he took his punishment with considerable fortitude. Fiscal legislation, which has nursed the manufacturing interest of the country, has done very little for him. After surviving the withdrawal of protection, it is a bitter trial to see his foreign competitor virtually subsidized. He has for years been living on his capital, and fair minds must regard his case as a hard one. It is true that Mr. Gladstone has recommended the production of jam. But adversity has rendered the English farmer sour and sceptical about nostrums of this kind. Mr. Gladstone, he says, cannot possibly know any thing about the difficulty of raising a profitable orchard. As soon as any tree was old enough to bear good fruit, he would feel bound to hew it down and send a section of the stem to a local exhibition. Such small industries, he thinks, need very patient and tender handling if they are to do any good. Paul may plant and Apollos may water, but the insatiable axe is fatal to permanent "increase." In the fondly remembered days of old, corn and meat were hum-drum, but profitable; jam is Arcadian but precarious. In his deep need, the English farmer must look for relief to some remedy altogether more drastic than jam. Any thinker who will devise a

clear, equitable and reasonably final solution of this conflict of interest will deserve the thanks of all fair-minded men.

(*d*) Much weight has been attributed to the desirability of quasi-scientific uniformity in the framing of rates, and to a spurious sort of iron-clad rigidity in the administration of railroads differing widely in their character, potentialities and general conditions and environment. The theory that all corporations, all producers and all consumers must imperatively be governed by inflexible statutory rules, and that they should in all cases be treated exactly alike, has a fine academic flavour. But in fact, when we come to face the results of experience, it is found that there is no magic in quasi-scientific uniformity and symmetry, because the conditions of the subject-matter to which these desirable principles are to be applied are not sufficiently understood; and, so far as they are understood, appear to be not sufficiently simple or homogeneous. Shocking as it must appear to the mind of the academic railroad reformer, enlightened and successful railroad administration consists—like politics—of a series of compromises. No doubt railroad administration, to be permanently sound and successful, must be tempered by a high sense of responsibility and informed with accurate knowledge. In the writer's opinion, a rational degree of publicity would tend to make the discretion of an able administration, in the framing of rates and tariffs, thoroughly acceptable to the public, without the intervention of the statutory "long- and short-haul" clause. Producers and consumers alike would have an even chance,\* and would know from time to time what accommodation they had a right to expect, with something like reasonable assurance. Disturbance of con-

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\* *Supra*, pp. 85-86,



tracts would be greatly economized, and litigation and controversy would be reduced to a minimum. After all said and done, the maximum welfare of the great majority of consumers, subject to certain special equities in favour of special classes, is and ought to be, in the last resort, the object of progressive railroad reform. To apply the familiar moral of a great saying of old, railroad legislation was made for man, and not man for railroad legislation. It is a very doubtful question whether the enactment of the "long- and short-haul" clause can be considered a desirable contribution to the object in view.

3. It remains to consider briefly some points bearing on the relation of the new statute to the general jurisprudence of the country. To substitute a comprehensive statutory enactment for a large and elastic body of case law is always a step of grave importance. The new statute may affect a large area of vested interests; may involve a large modification of familiar remedies; may prescribe large changes in existing rules of procedure. It may constitute a new and rigid line of departure, as compared with the pre-existing situation. In some instances it may create new offences, abrogate recognized equities, or abolish customs sanctioned by experience and more or less justified by success. In order to meet the requirements of the case with any semblance of adequacy, such a statute imperatively calls for the highest concentration of trained minds, and the clearest language of the ablest exponent. Though the desirability of legislation may be frankly accepted, a particular expression or embodiment of the proposed policy may be liable to serious, perhaps insuperable, objections. Each particular bill must stand or fall on its own merits. In this connection, the writer's objection to the new Act is that it undertakes to accomplish too much in the changes

which it imports into the existing jurisprudence of the country. Some specific points may properly be indicated.

(a) Perhaps the most important of these is one which is emphasized by Mr. Dos Passos in his able analysis of the Act,\* viz. the permission, not to say invitation, to intending plaintiffs to force defendants before the Commission without themselves possessing either a competent interest or a *prima facie* grievance. It would be idle to describe this abrogation of a vital principle of the common law as a mere matter of procedure. It goes to the root of sound public policy. The fathers of the jurisprudence of English-speaking races have always held that the right to ask the intervention of a court must in every case be made dependent on the possession of an interest or the existence of a wrong. They clearly foresaw that, if it were open to every litigious or meddlesome person to call upon the courts to aid him in the prosecution of vexatious or frivolous purposes, strife would be indefinitely increased, and the amateur litigant must eventually become the despot of the community in which he lived. Perhaps no more beneficent policy is to be found in the jurisprudence of England or America than that which is expressed in the familiar words "*ut sit finis litium.*" Of course this maxim constitutes the rationale and justification of statutes of limitation, which in many instances it would be difficult to defend on purely moral grounds. It would seem to the casual observer that the courts have quite enough to do in keeping down the arrears of *bona fide* litigation, instituted by persons who have a competent interest to assert or a colourable grievance to redress. To permit all sorts and conditions of

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\* "The Inter-State Commerce Act." By John R. Dos Passos. G. P. Putnam's Sons, New York, 1887.

men to set in motion the machinery of a new tribunal, without showing competent interest or at least colourable wrong, is a far-reaching measure. It is too far-reaching to be properly tacked on to a legislative act, which purports to regulate Inter-state commerce, but does not primarily purport to recast the jurisprudence of the country. The regulation of Inter-state commerce is confessedly important in its own way and within its own particular limits, but the jurisprudence of America is far too valuable to be indirectly tampered with. It is more vital, in its relations to the maintenance of the Federal Constitution and the welfare of the American people, than any other institution which can be named. If the people of America desire to change this system and its methods, they can of course do so at their discretion. But, in the writer's opinion, they should do so only after consideration and discussion of all questions involved, and not by a side-wind accidentally arising in connection with the regulation of Inter-state commerce. By parity of reasoning, it may be doubted whether the enlargement of the jurisdiction of U. S. Circuit Courts be not entitled to form a distinct and independent subject for special debate and discussion.

(b) The liability to be mulcted in costs constitutes a very necessary restraint on vexatious litigation. Under the new statute, however, no provision is made for payment of costs\* of a successful defendant. Anybody who pleases may force a railroad corporation before the Commission, and impose on it the expense and trouble of defence. But, even if the attack be made in a spirit of vexation or proceed from mere idle curiosity, the unsuccessful plaintiff gets off scot-free. The abolition of liability to

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\* "The Inter-State Commerce Act." By John R. Dos Passos. G. P. Putnam's Sons, New York, 1887.

costs unties the hands of a class which ought to be consistently, and in many instances severely, checked and restrained. By virtue of the recent Act there is opened to the meddlesome person a career at once congenial and inexpensive, and the blackmailer's millennium has arrived. Holders of railroad securities rightly desire to restrain litigation affecting their interests within the narrowest possible limits.

(c) The liability of corporations to persecution of an unprecedented kind is not even thus exhausted. If a plaintiff be not forthcoming outside the organization of the Commission, then the Commission itself may proceed to investigate. By section 13 the Commissioners may initiate investigation, and deal with the matter *as if a complaint had been made*. They may afterwards take part in adjudicating on the questions thus raised. This is a remarkable deviation from the traditions of American jurisprudence.

(d) Who are the persons indicated in section 16, through whom the Court, if it think fit, may direct and prosecute in such mode as it may appoint "all such enquiries as it may think needful to enable it to form a just judgment"? Are they to be considered as in some sense deputy commissioners, or are they to be regarded as amateur informers or fishermen whose services may be enlisted at will, if there is a reasonable prospect of sport? It is impossible to resist the conclusion that the creation of such functionaries places corporations in a very difficult position. Other provisions of the Act prevent them from defending themselves by familiar methods. They are precluded from meeting the emergency, by asking such investigating persons what competent interest they have in the concern about which they enquire. They cannot, with due regard to administrative economy, say that they



will place the business in the hands of their lawyers and resist the intrusion, because, even if the investigation should prove fruitless, they cannot recover their costs. Is it competent to the investigating persons to insist on the production by corporations of books, contracts, accounts or other confidential matter? Is disobedience to the requisitions of these sub-delegates or fishermen punishable in the same way as disobedience to the requisitions of the Commissioners or the Court? What are the limits of possible sub-delegation, and what are the official credentials of the class of sub-delegates or fishermen most remote from the source of central authority? To the casual observer this mechanism seems to resemble a stray leaf torn from the manual of Continental bureaucracy in the days of the third Napoleon. Having regard to the high character and ability of the existing Commissioners and to the dignity of the Court, it would not be a legitimate contention that any improper use will be made of this power. The objection is a general one, viz. that, if a particular power be an improper one and ought not to be included in the Act, it is an insufficient answer to say that it will most probably not be misused.

(e) In order to arrive at any intelligent conclusion, the owner of railroad property must compare his remedies under the system of jurisprudence existing prior to the passage of the Act, with the position which he occupies now that the bill under consideration has passed into law. It will of course occur to him that, if a case in which he was interested were presented to a jury, no presumptions would arise against him which (roughly speaking) were not warranted by the evidence before the Court. But under the recent Act he is liable to be fettered by presumptions created by the findings of the Commissioners. Now, the best of Commissioners are only mortal, and the

thorough investigation of the matters with which they will probably in the not very remote future be called on to deal may be expected to be heavy enough to tax the powers of twenty Commissioners instead of five. Without assuming any lack of diligence or thoroughness in investigation, the findings of heavily burthened Commissioners must often fail to be based on even approximately exhaustive data. On the whole, trial by jury, according to constitutional forms, would be indefinitely more satisfactory to the litigant, whether plaintiff or defendant, than the remedy prescribed by the recent Act.

(f) To a wise and satisfactory system of jurisprudence, the recognition of sound principles of equity and their enforcement by honest and educated representatives are indeed necessary conditions. But something further is needful, viz. consistent and enlightened rules of procedure. The importance of this element as a factor in the beneficial results of good administration of law is, in fact, greater than would seem to be supposed by the average layman. If rules of procedure are ill-conceived in principle or defective in detail, pleading in turn becomes tedious in its processes, and often futile in its results. Issues cannot be arrived at with reasonable promptitude or economy. The chariot of justice finds its wheels clogged and is driven heavily. The just and judicious determination of the various limitations of time and place which ought to be imposed on plaintiffs and defendants alike are of immense mechanical importance in the conduct of the litigious business of the country. It may be worth noting that in the recent Act the lessons of wisdom and experience derived from the past have not been adequately utilized. By section 13 it is enacted in effect that the rules of procedure relating to time, place etc.

shall in (presumably) a vast number of instances be such as the Commissioners direct.

The section provides that, under certain conditions covering a very large area, "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." To any one, who can conduct his legal business and settle the graver issues of life "in such manner and by such means as he may think proper," life must indeed be worth living. If the Commissioners can determine *manner* and *means* at their own discretion, they are truly masters of the whole situation; and the litigant who is forced before their tribunal must be entirely out of his latitude, without a chart to refer to or a compass to steer by. It would be difficult to effect a larger delegation\* of control over litigation than is conveyed by the power of determining "manner and means." For some generations the suitor, whether plaintiff or defendant, has (not unreasonably) relied on the established and familiar rules of procedure for guidance touching many important conclusions and inferences, outside the intrinsic merits of his case. If he wanted to decide within what approximate interval of time he could enforce a remedy, he looked to the rules of procedure for the answer to his question. If he were in doubt for how long a period hostile proceedings could be kept hanging over his head—perhaps clouding his title, impairing his credit or more or less impeding his financial operations—he looked to the same rules to furnish a reply. In the writer's opinion, these rules should be primarily devised by a deliberate consensus of the courts themselves, and not by legislative bodies or by their agents or even by an individual Judge, on the impulse of

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\* "The Inter-State Commerce Act," by John R. Dos Passos, pp. 85-86.

the moment. It may of course become necessary or expedient that a set of rules primarily constructed under the advice and with the approval of a body of judges should be adequately criticised, and, if found satisfactory, adopted by the legislative body to which it may appropriately be referred. But the average legislator is never more completely at sea than when he undertakes to deal with rules of procedure. These are properly within the province of the courts, which in the ordinary course of business are required to apply and enforce them. The inclusion of an exceedingly wide discretion in this respect is a drawback which must be taken into account in any candid consideration of the merits of the Act. The foreign investor would like to feel assured that his remedies as well as his rights are definite, consistent and trustworthy.

To sum up the foregoing observations, it will be gathered that, in the writer's opinion, the treatment of railroad reform as expressed in the Inter-State Commerce Act leaves much to be desired. As noted above, a terse bill confined exclusively to the repression of discrimination and extortion should have been first passed. It could properly have been disposed of by a short debate, because its conditions would have been fairly well understood. If its definitions and terminology had been equitable and clear, it would have commanded almost universal assent. So far as it went, it would have been accepted as a wise instalment of reform; and its prompt passage would have by no means retarded the approximately exhaustive consideration of obscure or imperfectly understood subjects outside its legitimate scope. Such short bill should have asked the appointment of a special Commission armed with adequate powers to investigate problems, for the correct solution of which there existed on the one hand no



urgent pressure, nor on the other any sufficient data. Such a course would have involved some advantages which would seem to be indicated by the signs of the times. Experts, who had devoted a lifetime to the solution of technical difficulties, would have had an opportunity to express their views. Partizan zeal, which (so far as can be judged by the context of circumstances) induced remote Southern and Western producers to support the bill, would have obtained a breathing space for reconsideration of views formulated in the heat of political excitement. No suspension of the Act, on the application of important sections of the community, would have been necessary. The doubts thereby (not unreasonably) created as to the intrinsic merits of the Act would have been superseded, and the authority of the new legislation would have been spared a very serious shock. As legislation has pursued a course very different from that which commends itself to the judgment of the writer, it would be tedious to discuss the matter further, beyond perhaps indicating tentatively the probable effect of the recent legislation on the interests of the foreign investor. At the outset, no doubt, the income of many railroads will not be diminished by its operation. In the first instance, many of them will be able to protect or indemnify themselves in one form or another. On the first blush of the thing, the restraint imposed on free transportation will be welcomed by the corporations. It will clearly constitute an appreciable economy; and the terms of the Act afford an adequate loop-hole for escape from such unpopularity as might otherwise have accrued to them from the new situation. Again, it will readily occur to the railroad companies that the price of any staple commodity delivered at an important centre of distribution and consumption

consists of two main items, viz. the net cost of production at the scene of production, and the cost of transportation thence to the point of consumption or retail distribution. Of these two elements the Act has undertaken to determine one, viz. the minimum cost of transportation; and this therefore is to a large extent a fixed quantity. The second item is governed by familiar laws affecting the cost of production; but, so far as Government interference is concerned, is left to take care of itself and is therefore elastic. It is plain that if a railroad corporation undertakes on a large scale the twofold functions of producing and transporting, it can subject the private producer to severe trials. The improved price which such producing and transporting corporation can obtain for transportation will enable it to write off a portion of the cost of production, and to undersell the private producer while still making a living profit for itself. The operation of this principle has been recently pointed out by an able writer in the *Evening Post*,\* and well illustrated by the instance of the coal trade of New York. That this combination of the functions of producing and transporting staple articles of commerce will ultimately tend to sound railroad administration is contrary to the writer's convictions. But it would be idle to hold that railroad corporations, finding themselves restricted by the Act in the prosecution of the policy which they prefer, will not endeavour to indemnify themselves by the adoption of the second-best course open to them, viz. that which gives the most lucrative result permitted by the new situation.

It goes without saying that the passenger business of railroads will be affected by the Act to a much less serious

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\* *N. Y. Evening Post*, April 14, 1887.

extent than their freight business. Increased weight will attach to the geographical direction of railroads and their relation to competitive water-routes, which will receive a considerable access of importance and prosperity. No doubt relative differences, in respect of intrinsic strength and solvency which already exist between rising and sinking railroads, will be more sharply accentuated than in the past. Those which traverse thickly settled districts and do a lucrative way business will be able to take care of themselves. But weaker lines, running through thinly populated districts and depending for their income on the transportation of raw material to remote markets, will find themselves very severely handicapped. By extraordinarily low through rates, the remote States and districts, which produce in profusion the staple raw materials of commerce, were in the past brought within measurable distance of older and more highly developed manufacturing communities. Specially low rates constituted, in fact, an appreciable bond of common interest and commercial unity between the extremities and the centres of life and energy in the great trading body. Legislation, which points to a partial paralysis of the co-operation and sympathy which the old state of things tended to foster, cannot, so far, be considered a legitimate subject for congratulation. The great inconveniences imposed on producers and consumers will, for a time, probably be felt by those classes more severely than by the railroad interest. But, as has been noted above, the ultimate interest of the transporting companies is closely identified with, and largely overlaps, that of the producing and consuming members of the community, who are, in short, the people of the United States. Sooner or later legislation, which embarrasses the vast population availing

itself of transportation, is destined to affect the interests of the companies which serve it. Sooner or later it will be perceived that unnecessary Government supervision in the conduct of the vast interests, which the Government cannot handle as efficiently as private administrators, is retrogressive in principle, and unsatisfactory in result. It will presently be discovered that comparative freedom from red tape will give the Canadian railroads an immense advantage over their American rivals. If, instead of being a tribunal for the prevention and redress of grievances, the Commission is destined to become a vast bureaucratic machine virtually supervising the books and papers connected with the immense railroad mileage of America, the institution will find many honest opponents. If the business of supervision is to be *thoroughly* carried out, an enormous staff of officials must be provided at the public expense. If it is to be conducted in a partial or perfunctory manner, the legislation which authorized it could have been scarcely worth enacting. As there exist no sufficient data to justify confident forecast, the investor will do well to await further developments, before committing himself to important decisions. On the one hand he has the valuable assurance that the Commission appointed to administer the Act consists of gentlemen of the highest ability and integrity, and that they will use their powers with wisdom and moderation. On the other hand, the Act which they are called on to administer is difficult of interpretation, and, so far as can be gathered from current indications, pregnant with obscure and unforeseen problems. For what it may be worth, the writer offers the opinion that, when the pulse of the nation has been adequately felt, it will be agreed on all hands that the recent Act does more harm than good;



and supplementary legislation will be urged by many large sections of the community. It will depend on the magnitude of the property at stake, and the earnestness with which its owners prosecute their purpose, whether a substantial modification of the Act be promptly made, or whether the interests of the country generally be destined to remain for a long time subject to gratuitous embarrassment. In the adjustment of commercial and trading relations the American people exhibit a very high degree of shrewdness and sagacity. It can scarcely fail to strike an observer that in the so-called struggle between the railroads and the people each party has in the past substantially obtained pretty much what it wanted and was entitled to have. Only the advanced and fiery politician ever pretended to believe that this struggle was interne-cine, and must end in Cæsarism on the one hand or socialism on the other. Practical observers regarded such prophecies as nonsensical and inconsistent with the habits and bias of the American people. When legislative obstacles were placed in the path of railroads, they at first strove to break them down and to control legislatures. Failing in many instances to accomplish this result, they compromised with the obstacles in their path in a very sensible way. Like Jacob at Bethel, they used the stones for a pillow and had a very comfortable night. On the other hand, the people were determined to have low rates; and it soon became apparent that they could get them, if they permitted the railroads themselves within rational limits to work out the problem in their own way. They enjoyed, prior to the passage of the Inter-State Commerce Act, the benefit of low rates and a good service. A reasonable *modus vivendi* had been arrived at, and the great bulk of the community was fairly well satisfied. In the

writer's opinion, the experience of the past affords the best key to the future; and what has happened before in connection with the railroad situation is likely to happen again. If this be so, the new legislation would appear calculated to challenge the vigilance, but not necessarily to excite the alarm, of the foreign investor.

Of course, to the radical politician it is a vital article of faith that, at all times and in all places, "something must be done." It is too much the fashion of the day to represent the merest fads of individual crotcheteers as an essential part of the majestic onward march of some great popular movement. The public are solemnly warned that to resist the noble and impressive procession of events is wilfully to oppose the inevitable. It is true that Gamaliel of old advised his hearers to avoid fighting against God. But, if closely examined, the legislation promoted by the crotcheteer often turns out to be by no means "of God," but very much "of man." The attitude of mind which regards every popular fad or caprice as an expression of the inevitable is apt to degenerate into a sort of dilettante fatalism. Why not examine closely and fearlessly the constituent elements of the supposed popular movement? It may be that what is described as a "majestic procession" will turn out to be a mere masquerade, and that many who pose as patriots are only mummers.

The point of view of the investor is separated from that of the thorough-going political partizan by a broad line of demarcation. Their relative attitude is something like that of the claimants to possession of the child in the familiar "Judgment of Solomon." In America—as in England to-day—the ambitious politician is quite willing that the infant should be cut in halves, if by such an arrangement he can disappoint and "dish" his opponents.

On the contrary, the investor, as such, has no record to maintain and no opponent to "dish"; and he would rather make concessions than see the child vivisected. His consistent desire is not that "something should be done," but that whatever is undertaken be *well* done.

## CHAPTER XX.

### THE "ALIEN LAND ACT."

THE recent Act entitled "An Act to restrict the ownership of real estate in the Territories to American citizens, and so forth," popularly known as the "Alien Land Act," contains provisions of very considerable importance, from the point of view of that class of foreign investors which has, in the past, locked up a large amount of capital in the acquisition of American land. Prior to the passage of the Act, many investors of this class had intended to enlarge their existing investments and to compact and consolidate them by further purchases. Other groups of capitalists, who were not committed in the past but were distrustful of European spheres of investment, had entertained the project of acquiring large blocks of land in America. By persons acquainted with the situation it could not for a moment be doubted that legislation of a restrictive kind would be carried through both Houses of Congress, as soon as the condition of legislative business rendered such a result feasible. It may therefore be hoped that the passage of the Alien Land Bill will create serious disappointment exclusively in the minds of those who failed to interpret the signs of the times. Inasmuch however as the interests involved are substantial, and the provisions of the Act somewhat stringent, it is thought that a copy of the text may form a convenient appendix to the present notes. It will readily appear to the foreign



owner of land in America that, while his future interests are restricted, his investments in the past are not necessarily prejudiced to any serious extent. The limitations imposed by the Act are undoubtedly cogent, and the penalties severe. If the history of the past be wisely interpreted, it may be doubted whether they are altogether wise. But they plainly represent the views of the American people; and therefore elaborate discussion from the investor's point of view would be superfluous—not to say tiresome. The upshot of the Act is shortly this: that the *bond fide* alien owner of American land can protect legitimate interests already acquired; but that, as regards future enterprises, he is compelled to draw in his horns. The wisdom and expediency of the "twenty-per-cent" limit of course admit of wide difference of opinion. In the writer's view, it is a somewhat premature expression of patriotism at the expense of obvious profit. But; if the American people think that the time has arrived to check foreign investment in land, they are clearly the masters of the position.



## APPENDIX A.

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Extracts from the Constitution of the State of Georgia relating to railroads, together with the law creating a Railroad Commission.

### CONSTITUTION.

#### ARTICLE IV.—SECTION II.

Paragraph I.—The power and authority of regulating railroad freight and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties.

Par. III.—The General Assembly shall not remit the forfeiture of the charter of any corporation, now existing, nor alter or amend the same, nor pass any other general or special law for the benefit of said corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution ; and every amendment of any charter of any corporation in this State, or any special law for its benefit, accepted thereby, shall operate as a novation of said charter, and shall bring the same under the provisions of this Constitution : *Provided*, that this section shall not extend to any amendment for the purpose of allowing

any existing road to take stock in or aid in the building of any branch road.

Par. IV.—The General Assembly of this State shall have no power to authorize any corporation to buy shares, or stock, in any other corporation in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly ; and all such contracts and agreements shall be illegal and void.

Par. V.—No railroad company shall give, or pay, any rebate, or bonus in the nature thereof, directly or indirectly, or do any act to mislead or deceive the public as to the real rates charged or received for freights or passage ; and any such payments shall be illegal and void, and these prohibitions shall be enforced by suitable penalties.

Par. VI.—No provisions of this article shall be deemed, held or taken to impair the obligation of any contract heretofore made by the State of Georgia.

Par. VII.—The General Assembly shall enforce the provisions of this article by appropriate legislation.

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The following is the law under which the Railroad Commission was created, being Act No. 269, Part 1, Title 12, of the Acts and Resolutions of the General Assembly of the State of Georgia, 1878-1879 :

#### AN ACT

*To provide for the regulation of railroad freight and passenger tariffs in this State ; to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations and lessees in this State from charging other than just and reasonable rates, and to punish the same, and prescribe a mode*



*of procedure and rules of evidence in relation thereto ; and to appoint Commissioners, and to prescribe their powers and duties in relation to the same.*

WHEREAS, it is made the duty of the General Assembly, in article 4, paragraph 2, and section 1 of the Constitution, to pass laws from time to time to regulate freight and passenger tariffs ; to prohibit unjust discriminations on the various railroads of this State, and to prohibit railroads from charging other than just and reasonable rates, and enforce the same by adequate penalties ; therefore,

SECTION 1.—*Be it enacted by the General Assembly of Georgia,* That there shall be three Commissioners, appointed by the Governor, with the advice and consent of the Senate, to carry out the provisions of this Act, of whom one shall be of experience in the law, and one of experience in railway business. After the expiration of the terms of the office of the Commissioners first appointed, the term of office of successors shall be six years ; but, at the first appointment, one Commissioner shall be appointed for two years, one for four years, and one for six years. The salary of each Commissioner shall be twenty-five hundred dollars, to be paid from the Treasury of the State. Any Commissioner may be suspended from office by order of the Governor, who shall report the fact of such suspension, and the reasons therefor, to the next General Assembly, and if a majority of each branch of the General Assembly declare that said Commissioner shall be removed from office, his term of office shall expire. The Governor shall have the same power to fill vacancies in the office of Commissioner as to fill other vacancies, and if, for any reason, said Commissioners are not appointed during the present session of the General Assembly, the Governor shall appoint them thereafter, and report to the next Senate, but the time until then shall not be counted as part of the term of office of said Commissioners, respectively, as herein provided. Said Commissioners shall take an oath of

office, to be framed by the Governor, and shall not, jointly or severally, or in any way, be the holders of any railroad stock or bonds, or be the agent or employee of any railroad company, or have any interest in any way in any railroad, and shall so continue during the term of office ; and in case any Commissioner becomes disqualified in any way, he shall at once remove the disqualification or resign, and on failure so to do, he must be suspended from office by the Governor, and dealt with as hereinafter provided. In any case of suspension the Governor may fill the vacancy until the suspended Commissioner is restored or removed.

SEC. II.—That said Commissioners shall be furnished with an office, necessary furniture, and stationery, and may employ a secretary or clerk, at a salary of twelve hundred dollars, at the expense of the State. The office of said Commissioners shall be kept in Atlanta, and all sums of money authorized to be paid by this Act out of the State Treasury shall be paid only on the order of the Governor : *Provided*, that the total sum to be expended by said Commissioners for office rent, furniture, and stationery shall, in no case, exceed the sum of five hundred dollars (\$500.00,) or so much thereof as may be necessary, per annum.

SEC. III.—That from and after the passage of this Act, if any railroad corporation, organized or doing business in this State, under any Act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized, under the laws of any other State, and doing business in this State, shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad-car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate, or control, the same shall be deemed guilty of extortion,

and, upon conviction thereof, shall be dealt with as hereinafter provided.

SEC. IV.—That if any railroad corporation as aforesaid shall make any unjust discrimination in its rates or charges of toll or compensation for the transportation of passengers or freights of any description, or for the use and transportation of any railroad-car upon its said road, or upon any of the branches thereof, or upon any railroads connected therewith, which it has the right, license, or permission to operate, control or use, within this State, the same shall be deemed guilty of having violated the provisions of this Act, and, upon conviction thereof, shall be dealt with as hereinafter provided.

SEC. V.—That the Commissioners appointed as hereinbefore provided, shall, as provided in the next section of this Act, make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations, to be observed by all railroad companies doing business in this State, as to charges at any and all points, for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State; shall make reasonable and just rates of charges for use of railroad-cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent the giving or paying of any rebate or *bonus*, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers: *Provided*, that nothing in this Act contained shall be taken as in any manner abridging or controlling the rates for freight charged by any railroad company in this State for carrying freight which comes from or goes beyond the boundaries of the State, and on



which freight less than local rates on any railroad carrying the same are charged by such railroad, but said railroad companies shall possess the same power and right to charge such rates for carrying such freights as they possessed before the passage of this Act ; and said Commissioners shall have full power by rules and regulations to designate and fix the difference in rates of freight and passenger transportation, to be allowed for longer and shorter distances on the same or different railroads, and to ascertain what shall be the limits of longer and shorter distances.

SEC. VI.—That the said Railroad Commissioners are hereby authorized and required to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads ; and said schedule shall, in suits brought against any such railroad corporations wherein is involved the charges of any such railroad corporation for the transportation of any passenger or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads ; and said Commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised, as aforesaid, it shall be the duty of said Commissioners to cause publication thereof to be made for four successive weeks in some public newspapers published in the cities of Atlanta, Augusta, Albany, Savannah, Macon, Rome, and Columbus, in this State ; and after the same shall be so published, it shall be the duty of all such railroad companies to post, at all their respective stations, in a conspicuous place, a copy of said schedule for the protection of the people : *Provided*, that the schedules thus prepared shall not be taken as evidence, as herein provided, until schedules



shall have been prepared and published as aforesaid, for all the railroad companies now organized under the laws of this State, or that may be organized at the time of said publication. All such schedules purporting to be printed and published as aforesaid, shall be received and held in all such suits, as *prima facie* the schedules of said Commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the Railroad Commission that the same is a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that the same has been duly published as required by law, stating the name of the paper in which the same was published, together with the date and place of said publication.

SEC. VII.—That it shall be the duty of said Commissioners to investigate the books and papers of all the railroad companies doing business in this State, to ascertain if the rules and regulations aforesaid have been complied with, and to make personal visitation of railroad offices, stations and other places of business for the purpose of examination, and to make rules and regulations concerning such examinations, which rules and regulations shall be observed and obeyed as other rules and regulations aforesaid; said Commissioners shall also have full power and authority to examine all agents and employees of said railroad companies and other persons, under oath or otherwise, in order to procure the necessary information, to make just and reasonable rates of freight and passenger tariffs, and to ascertain if such rules and regulations are observed or violated, and to make necessary and proper rules and regulations concerning such examination, and which rules and regulations herein provided for shall be obeyed and enforced as all other rules and regulations provided for in this Act.

SEC. VIII.—That all contracts and agreements between railroad companies doing business in this State, as to rates of freight and passenger tariffs, shall be submitted to said Commissioners for inspection and correction, that it may be seen

whether or not they are a violation of law or of the provisions of the Constitution, or of this Act, or of the rules and regulations of said Commissioners ; and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies doing business in this State, shall be submitted to said Commissioners for inspection and approval, in so far as they affect rules and regulations made by said Commissioners, to secure to all persons doing business with said companies just and reasonable rates of freight and passenger tariffs ; and said Commissioners may make such rules and regulations as to such contracts and agreements as may be then deemed necessary and proper, and any such agreements not approved by such Commissioners, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held, and taken to be, violations of article 4, section 1, paragraph 4 of the Constitution, and shall be illegal and void.

SEC. IX.—That if any railroad company doing business in this State, by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by said Commissioners ; and if, after due notice of such violation given to the principal officer thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said Commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than one thousand dollars, nor more than five thousand dollars, to be fixed by the presiding Judge. An action for the recovery of such penalty shall lie in any county in the State where such violation has occurred, or wrong has been perpetrated, and shall be in the name of the State of Georgia. The Commissioners shall institute such action through the Attorney-General or Solicitor-General, whose fees shall be the same as now provided by law.

SEC. X.—That if any railroad company doing business in this

State shall, in violation of any rule or regulation provided by the Commissioners as aforesaid, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in the county where the same was done, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in actions between individuals, except that in cases of wilful violation of law, such railroad companies shall be liable to exemplary damages : *Provided*, that all suits under this Act shall be brought within twelve months after the commission of the alleged wrong or injury.

SEC. XI.—That in all cases under the provisions of this Act the rules of evidence shall be the same as in civil actions, except as hereinbefore otherwise provided. All fines recovered under the provisions of this Act shall be paid into the State Treasury, to be used for such purposes as the General Assembly may provide. The remedies hereby given the persons injured shall be regarded as cumulative to the remedies now given by law against railroad corporations, and this Act shall not be construed as repealing any statute giving such remedies.

SEC. XII.—That the terms “railroad corporation,” or “railroad company,” contained in this Act shall be deemed and taken to mean all corporations, companies, or individuals now owning or operating, or which may hereafter own or operate any railroad, in whole or in part, in this State, and the provisions of this Act shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon any of the lines of railroad in this State, (street railways excepted) the same as to railroad corporations hereinbefore mentioned.

SEC. XIII.—That all railroad companies in this State shall, on demand, issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and so far as practicable shall state the freight charges over other roads that



carry such freight. When the consignee presents the railroad receipt to the agent of the railroad that delivers such freight, such agent shall deliver the article shipped on payment of the rate charged for the class of freights mentioned in the receipt. If any railroad company shall violate this provision of the statute, such railroad company shall incur a penalty to be fixed and collected as provided in section nine of this Act.

SEC. XIV.—That it shall be the duty of the Commissioners herein provided for, to make to the Governor semi-annual reports of the transactions of their office, and to recommend from time to time such legislation as they may deem advisable under the provisions of this Act.

SEC. XV.—That said Railroad Commissioners, in making any examination for the purpose of obtaining information pursuant to this Act, shall have power to issue subpoenas for the attendance of witnesses, by such rules as they may prescribe. And said witnesses shall receive for such attendance two dollars per day, and five cents per mile, traveled by the nearest practicable route in going to and returning from the place of meeting of said Commissioners, to be ordered paid by the Governor upon presentation of subpoenas, sworn to by the witnesses, as to the number of days served and miles travelled, before the clerk of said Commissioners, who is hereby authorized to administer oaths. In case any person shall wilfully fail or refuse to obey such subpoena, it shall be the duty of the Judge of the Superior Court, of any county, upon application of said Commissioners, to issue an attachment for such witness, and compel him to attend before the Commissioners and give his testimony upon such matters as shall be lawfully required by such Commissioners, and said court shall have power to punish for contempt, as in other cases of refusal to obey the process and order of such court.

SEC. XVI.—That every officer, agent or employee of any railroad company who shall wilfully neglect or refuse to make and furnish any report required by the Commissioners, as neces-



sary to the purposes of this Act, or who shall wilfully and unlawfully hinder, delay or obstruct said Commissioners in the discharge of the duties hereby imposed upon them, shall forfeit and pay a sum of not less than one hundred, nor more than five thousand, dollars, for each offense, to be recovered in an action of debt in the name of the State.

SEC. XVII.—That all laws militating against this Act are hereby repealed.

Extract from the general Railroad Law of Massachusetts, being chapter 112 of the Public Statutes.

#### RIGHTS RESERVED BY THE COMMONWEALTH.

SECT. 6.—Nothing contained in this chapter shall be construed to impair the rights of the commonwealth as asserted or reserved in previous statutes. The provisions of this chapter, and the franchises, rights, powers, privileges, duties, and liabilities of railroad corporations established under this or any general statute, may be altered, amended, or repealed, and the general court may annul or dissolve any such corporation.

SECT. 7.—The commonwealth may at any time during the continuance of the charter of a railroad corporation, after the expiration of twenty years from the opening of its road for use, purchase of the corporation its road and all its franchise, property, rights, and privileges, by paying therefor such sum as will reimburse to it the amount of capital paid in, with a net profit thereon of ten per cent. a year from the time of the payment thereof by the stockholders to the time of the purchase.

SECT. 8.—The commonwealth may at any time take and possess the road, franchise, and other property of a railroad corporation, after giving to it one year's notice in writing ; and shall pay therefor such compensation as may be awarded by three commissioners, to be appointed by the supreme judicial court, who shall be sworn to appraise the same justly and fairly, and shall estimate and determine all damages sustained by it

by such taking ; and a corporation aggrieved by the determination of said commissioners may have its damages assessed by a jury of the superior court in the county of Suffolk, in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways in the city of Boston.

## APPENDIX B.

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[PUBLIC—NO. 126.]

An Act to restrict the ownership of real estate in the Territories to American citizens, and so forth.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person or persons not citizens of the United States or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some State or Territory of the United States to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created : *Provided*, That the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer.

SEC. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in

any of the Territories of the United States or of the District of Columbia.

SEC. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold, or own more than five thousand acres of land in any of the Territories of the United States ; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than it may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

SEC. 4. That all property acquired, held, or owned in violation of the provisions of this Act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this Act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this Act mentioned.

Approved, March 3, 1887.



## APPENDIX C.

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### THE INTER-STATE COMMERCE ACT OF FEBRUARY 4, 1887.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any

railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease ; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just ; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. II.—That if any common carrier, subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. III.—That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic

between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines ; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4.—That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance ; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance : *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property ; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. V.—That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof ; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offence.

SEC. VI.—That every common carrier subject to the provi-

sions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States, shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment ; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties, as if said freight were of foreign production ; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier, in compliance with the requirements of this



section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect ; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice ; but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

And when any such common carrier shall have established and published its rates, fares, and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or from any services in connection therewith than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes estab-

lish joint tariffs of rates, or fares, or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable ; and said Commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published ; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offence may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section ; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act ; and failure to comply with its requirements shall be punishable as and for a contempt ; and the said Commissioners, as complainants, may also apply, in any such Circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States

and Territories of the United States, or between the United States and adjacent foreign countries, or between the ports of trans-shipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

SEC. VII.—That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination ; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, or stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. VIII.—That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as part of the costs in the case.

SEC. IX.—That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf

for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction ; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages, the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit ; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. X.—That any common carrier subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offence was committed, be subject to a fine of not to exceed five thousand dollars for each offence.



SEC. XI.—That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President ; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

SEC. XII.—That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created ; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements, and

documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question ; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. XIII.—That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of any thing done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts ; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complaint only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be

any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. XIV.—That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier, to any party or parties who may be found to have been injured ; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of

SEC. XV.—That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that any thing has been done or omitted to be done in violation of the provisions of this act or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect



thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission ; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. XVI.—That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States, sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be ; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable ; and such notice may be served on such common carrier, his or its officers, agents or servants, in such manner as the court shall direct ; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises ; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such



inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition ; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated ; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same ; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents, of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise ; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars a day for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise, and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the Treasury ; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme

Court of the United States, under the same regulations now provided by law in respect of security for such appeal, but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon ; and such court may in every such matter order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the District Attorney, under the direction of the Attorney-General of the United States, to prosecute the same ; and the costs and expenses of such prosecution shall be paid out of the appropriations for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

SEC. XVII. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, a majority of the Commission shall constitute a quorum for the transaction of business ; but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations.

SEC. XVIII. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the

United States. The Commission shall appoint a Secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employes as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employes under their orders, in making any investigation, in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the Chairman of the Commission and the Secretary of the Interior.

SEC. XIX. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but, whenever the convenience of the public or of the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of the fact pertaining to the business of any common carrier subject to the provisions of this act.

SEC. XX. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports

shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same ; the dividends paid, the surplus fund, if any, and the number of stockholders ; the funded and floating debts, and the interest paid thereon ; the cost and value of the carrier's property, franchises, and equipment ; the number of employés and the salaries paid each class ; the amounts expended for improvements each year, how expended, and the character of such improvements ; the earnings and receipts from each branch of business and from all sources ; the operating and other expenses ; the balances of profit and loss ; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers as the Commission may require ; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. XXI. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary.



SEC. XXII. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets ; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion ; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers or employés ; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies : *Provided*, That no pending litigation shall in any way be affected by this act.

SEC. XXIII. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, Anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto.

SEC. XXIV. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the Commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

Approved February 4, 1887.



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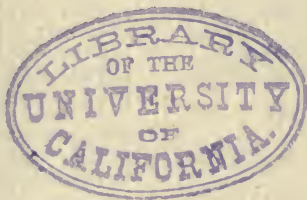
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